

# **AGGREGATE LITIGATION IN ARGENTINA AND BRAZIL: PRINCIPAL FEATURES AND SOME NOTES ON THE VIABILITY OF ENFORCING AMERICAN CONSUMER CLASS ACTION JUDGMENTS IN THOSE COUNTRIES**

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## **I. INTRODUCTION**

One of today's main concerns of the scholars who are working on aggregate litigation is how to face the phenomenon of extended transnational markets and commerce. That is, the question is how to construct plausible solutions to allow the parties involved in a dispute to obtain a reasonable and comprehensive response, without regard to where they are physically situated or to what court asserts jurisdiction over the case.

Particularly during the last 10 years or so, some scholars have published quite interesting papers dealing with class actions in the international landscape.<sup>1</sup> Notwithstanding that they have faced the issue from different perspectives; there are three common features that can be identified in their works. First, to some extent all of them discuss the similarities and differences between the US class actions and the aggregate litigation devices which can be found abroad. Second, in some measure all of them discuss if and how these foreign systems could be harmonized with the US class actions. Finally, almost all of the scholars have oriented their work toward the European landscape and paid no attention to the Latin American context.<sup>2</sup>

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<sup>1</sup> Among others, see Michael P. Murtagh *"The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies"*, 34 *Hastings Int'l & Comp. L. Rev.* 1 (2011); John C. Coffee, Jr. *"Litigation Governance: Taking Accountability Seriously"*, 110 *Colum. L. Rev.* 288 (2010); Samuel Issacharoff and Geoffrey P. Miller *"Will Aggregate Litigation Come to Europe?"* 62 *Vand. L. Rev.* 179 (2009); Richard A. Nagareda *"Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism"*, 62 *Vand. L. Rev.* 1 (2009); Stephen J. Choi and Linda J. Silberman *"Transnational Litigation and Global Securities Class Action Lawsuits"*, 2009 *Wis. L. Rev.* 465 (2009); Edward F. Sherman *"American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems"*, 215 *F.R.D.* 130 (2003); Michele Taruffo *"Some Remarks on Group Litigation in Comparative Perspective"*, 11 *Duke J. Comp. & Int'l L.* 405 (2001).

<sup>2</sup> There are some rare exceptions to the rule. Among the most recent works on aggregate litigation focusing from the US on Latin America it is worthwhile to underline those of Antonio Gidi *"Class Actions in Brazil. A Model for Civil Law Countries"*, 51 *Am. J. Comp. L.* 311 (2003); and *"Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil"*, UNAM, México, 2004. See also Angel R. Oquendo *"Upping the Ante: Collective Litigation in Latin America"*, 47 *Colum. J. Transnat'l L.* 248 (2009).

The principal aim of this paper is to continue the comparative perspective that characterizes those works, but bearing in mind the Latin American scenario instead of the European one.<sup>3</sup> Latin American countries deserve special attention nowadays when it comes to discussions about these issues, not just because the somewhat recent economic recuperation of the region, which has attracted several transnational companies to engage in business,<sup>4</sup> but also because it is possible to find there some of the most attractive aggregate litigation devices currently operating in the civil law world.

The paper is divided in three main parts and some final comments. In the first one I will present an overview of some of the most salient characteristics of the American class actions enacted in the Federal Rule of Civil Procedure 23 (hereinafter “FRCP 23”) and the aggregate litigation devices currently available in Argentina and Brazil. That overview will be structured around 3 basic questions: (i) who can file an action invoking a representative status on behalf of a group of people similarly situated; (ii) which are the remedies that plaintiffs can demand from the court when acting in that character; and (iii) which is the scope of finality/closure that can be achieved through these kind of actions. Due to the fact that the procedural framework of aggregate litigation in Argentina and (at least to some extent) also in Brazil depends on the substantive area of law involved in the dispute, I will limit my inquiry to the field of consumers and users’ rights.

Some particular characteristics are worth to be mentioned at the outset. In the case of Argentina, the first one is the constitutional pedigree of collective standing to sue: art. 43, 2<sup>nd</sup> parag. of the Argentinean Federal Constitution (hereinafter “AFC”) vests certain kind of NGOs, the ombudsman and the individual “affected” with the right to initiate representative lawsuits. The second is the 2008 reform to the Consumer Protection Act N° 24.240 (hereinafter “CPA”) by the Act N° 26.361.<sup>5</sup> Even though the CPA can be considered as a substantive law, that reform has incorporated several provisions which regulate different aggregate procedural issues, improving the very limited content of the original version in this

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<sup>3</sup> Ideally, it should entail the objectives proposed by Samuel P. Baumgartner in *“Is Transnational Litigation Different?”*, 25 U. Pa. J. Int’l Econ. L. 1297, 1387 (2004) (that is: *“a clearly stated objective (to provide knowledge about foreign ideational values underlying procedural approaches) and a defined topic (the views relevant to transnational litigation)”*).

<sup>4</sup> As to January 2011 Brazil is one of the top ten US trading partners (see <http://www.census.gov/foreign-trade/statistics/highlights/top/top1101yr.html>). In the case of Argentina, soon after the devastating economic crisis that moved the people to demand the resignation of the government in 2001 the Gross National Product was 216.8 billion pesos. Today, it amounts to a total of 442.2 billion pesos (official information about Argentinean economy can be consulted at <http://www.indec.mecon.ar>).

<sup>5</sup> B.O. April 7<sup>th</sup>, 2008.

regard.<sup>6</sup> The last relevant aspect of the Argentinean current law in this field is the Supreme Court of Justice (hereinafter “SCJA”) tight 4-3 decision in “*Halabi*”,<sup>7</sup> where the majority held that in Argentina is “*perfectly acceptable*” to file actions “*with analogous characteristics and effects as US class actions*”.<sup>8</sup> This opinion received favorable comments in general terms,<sup>9</sup> even though it could be criticized from several points of view.<sup>10</sup>

Regarding Brazil, the legal background in this field is quite different. Particularly remarkable is the Consumer Defense Code of 1990 (hereinafter “CDC”),<sup>11</sup> which on the one hand enacted three categories of consumers’ substantive collective rights (diffuse, collective and “homogeneous individual”),<sup>12</sup> and on the other vested different social actors (but not individuals) with standing to sue on behalf of consumers in order to enforce those rights, i.e. the Public Ministry, the state (federal, local, municipal), public entities, organisms committed to the defense of consumers’ rights, and NGOs. The CDC also includes a specific regulation for the enforcement of “homogeneous individual” rights, which to some extent resembles the issue class action for damages structure.<sup>13</sup> Lastly, as we will see, the CDC regulates the expansive effect of *res judicata* in a very peculiar way, almost completely different from the system established in the FRCP 23.<sup>14</sup>

The second part of the paper will be dedicated to show that, though informed by different legal traditions, the procedural systems to face collective conflicts implemented in Argentina, Brazil and the US share some relevant common core characteristics. Generalizing

<sup>6</sup> The new provisions deal with standing to sue, *res judicata*, enforcement of judgments, litigation costs, burden of proof and settlements (Act N° 26.316, arts. 24, 26, 27 and 28).

<sup>7</sup> SCJA in re “*Halabi Ernesto c/ Poder Ejecutivo Nacional*”, 24/02/09, Fallos 332:111. All the SCJA cases are available online at [www.csjn.gov.ar](http://www.csjn.gov.ar).

<sup>8</sup> Parag. 19° of the opinion.

<sup>9</sup> Gregorio Badeni “*El dinamismo tecnológico impone la creatividad judicial para la defensa de los derechos humanos*” L.L. 2009-B-255; Roberto J. Boico “*La nueva etapa del amparo colectivo. El caso Halabi y el actual escenario del art. 43 de la C.N.*”, L.L. 2009-B-208; Mariana Catalano and Lorean González Rodríguez “*Los litigios masivos según el prisma de la Corte Suprema*”, L.L. 2009-B-598; Juan C. Cassagne “*Derechos de incidencia colectiva. Los efectos ‘erga omnes’ de la sentencia. Problemas del reconocimiento de la acción colectiva*”, L.L. 2009-B-646; Fernando De la Rúa and Bernardo Saravia Frías “*Acciones de clase: un avance pretoriano determinante del Alto Tribunal*”, L.L. 06/05/2009; Fernando R. García Pullés “*Las sentencias que declaran la inconstitucionalidad de las leyes que vulneran derechos de incidencia colectiva. ¿El fin del paradigma de los límites subjetivos de la cosa juzgada? ¿El nacimiento de los procesos de clase?*”, L.L. 2009-B-186; Claudio D. Gómez and Marcelo J. Salomón “*La Constitución Nacional y las acciones colectivas: Reflexiones en torno al caso ‘Halabi’*”, L.L. Sup. Const. 2009 (mayo), 41; María A. Gelli “*La acción colectiva de protección de derechos individuales homogéneos y los límites al poder en el caso ‘Halabi’*”, L.L. 2009-B-565; Carlos A. Rodríguez “*Las acciones colectivas a la luz de un fallo de la SCJA*”, D.J. del 25/03/2009; Ramiro Rosales Cuello and Javier D. Guiridlian Larosa “*Nuevas consideraciones sobre el caso ‘Halabi’*”, L.L. 2009-D-424; Daniel A. Sabsay “*El derecho a la intimidad y la ‘acción de clase’*”, L.L. 2009-B-401; Maximiliano Toricelli “*Un importante avance en materia de legitimación activa*”, L.L. 2009-B-202; Néstor P. Sagüés “*La creación judicial del ‘amparo-acción de clase’ como proceso constitucional*”, SJA 22/4/2009.

<sup>10</sup> For a criticism on the standards employed by the CSJN to assess the adequacy of representation see Eduardo Oteiza and Francisco Verbic “*La Corte Suprema Argentina regula los procesos colectivos ante la demora del Congreso. El requisito de la representatividad adecuada*”, RePro N° 185 (2010), Ed. Revista dos Tribunais, Sao Paulo.

<sup>11</sup> Act N° 8078 (September 11st., 1990).

<sup>12</sup> Art. 81.

<sup>13</sup> Arts. 91-100 CDC.

<sup>14</sup> Arts. 103-104 CDC.

for the sake of comparison, I will argue that all of them allow representative suits on behalf of groups of people similarly situated, and that all of them have found different ways of dealing with the due process concerns inherent to this kind of lawsuits. The objective of this part of the paper is to show that the US class actions, traditionally considered as one of the unique characteristics defining “American procedural exceptionalism”, are nowadays far from being something “exotic” in the international landscape (and more particularly, within the American continent).<sup>15</sup> In other words: even though it is certainly possible to find differences between the American class actions and the Argentinean and Brazilian collective procedural devices, nowadays those differences are not as relevant as one could imagine beforehand.<sup>16</sup>

In the third part of the paper I will present a hypothetical and discuss if and to what extent, in light of the trend to convergence of models in the field of representative litigation, judicial opinions issued in the context of a FRCP 23 consumer class actions can be enforced in Argentina and Brazil. In order to discuss this issue, I will assess the scope of the three most relevant requirements established in both Argentina and Brazil in order to recognize the validity of a foreign judgment: (i) public policy considerations (“public order”); (ii) due process of law concerns; and (iii) proper assertion of jurisdiction in the country where the judgment was delivered. I will argue that recognition and enforcement of an American consumer class action judgment against a private corporation is likely to be granted both in Argentina and Brazil, due to the macro similarities between the representative procedural systems established therein and the mechanism regulated in the FRCP 23. I have chosen to study this scenario due to the fact that, regardless of the existence of aggregate litigation procedures established in different countries all along the globe,<sup>17</sup> the attitude of US federal courts’ toward personal jurisdiction in international cases,<sup>18</sup> plus some exceptional devices and procedural tools that might not be easy

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<sup>15</sup> See Scott Dodson “Comparative Convergence in Pleading Standards”, 158 U. Pa. L. Rev. 441, 446 (2010) (listing class actions among other features of “American procedure’s entrenched exceptionalism” like “liberal pleading, liberal (and costly) discovery ... a disengaged judge, civil juries, largely unfettered damage assessments, and the ‘American rule’ of cost allocation”). Interestingly, Chase does not mention class actions as one of the features that constitute what he called “a culturally constituted American ‘procedural exceptionalism’”. See Oscar G. Chase “American ‘Exceptionalism’ and Comparative Procedure”, 50 Am. J. Comp. L. 277, 287 (2002) (arguing that American exceptionalism is determined primarily by four features: “They are (i) the civil jury; (ii) the use of party-controlled pre-trial investigation; (iii) the relatively passive role of the judge at the trial or hearing; and (iv) the method of obtaining and using expert opinions on technical matters”).

<sup>16</sup> In this line, Richard A. Nagareda “Aggregate Litigation Across The Atlantic and the Future of American Exceptionalism”, 62 Vand. L. Rev. 1 (2009);

<sup>17</sup> For references on recent developments in European countries, see Richard A. Nagareda “Aggregate Litigation Across The Atlantic and the Future of American Exceptionalism”, 62 Vand. L. Rev. 1, 21-26 (2009).

<sup>18</sup> In this respect, however, it must be noted that nowadays there is a relevant “personal general jurisdiction” case pending before the Supreme Court, which involves foreign defendants in a product liability case (“*Goodyear v. Brown*”, the opinion of the Supreme Court of Justice of North Carolina and all relevant documents related to the certiorari proceedings can be consulted at <http://www.scotusblog.com/case-files/cases/goodyear-luxembourg-tires-sa-v-brown/>). The fact pattern of the case can be summarized as follows: in April 2004, Julian Brown and Matthew Helms traveled to France with other North Carolina Youth Soccer Association soccer players, all boys ages fourteen and under, who were considered the best

to find elsewhere, provide foreign litigants with relevant incentives to initiate their international collective cases in the US.<sup>19</sup>

I will close the paper with a few final comments and remarks. On the one hand, I will present yet another point of convergence among systems: the public policy objectives underlying these kinds of collective procedural regulations. On the other, I will suggest that in a current scenario of international commerce, internet sales and global enterprises, the time has arrived to start thinking about possible mechanisms to coordinate aggregate cross-border litigation.

## **II. MAIN FEATURES OF REPRESENTATIVE LAWSUITS IN THE UNITED STATES, ARGENTINA AND BRAZIL**

### **a. General overview on aggregate litigation in these countries**

#### **i. American federal class actions**

The US is a federal country, whose central state coexists with 50 local states and a federal district. Each local state has retained the power to dictate their own rules of civil procedure, and almost all of them have enacted class action devices in order to deal with

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young soccer players from North Carolina. On the morning of April 18, 2004, a bus carrying Julian Brown, Matthew Helms, and their teammates from Nantes, France to the Charles DeGaulle Airport for their flight home went out of control on a highway ramp, hit a concrete separating wall, and overturned. Julian was ejected from the bus and was later found by rescuers underneath it. While in a coma, Julian was transported by ambulance to a hospital in Paris, where doctors pronounced him clinically brain dead and removed his life support. Julian died shortly thereafter. Matthew suffered serious upper body injuries and lacerations in the crash. He died at the scene of the accident. According to the complaint, when the driver attempted to regain control of the bus after entering a curve on a ramp, the outside back rear tire failed, causing the bus to go further out of control. The tire was defective in that its plies separated, causing the tire to fail. This tire was designed, manufactured, and sold by the Goodyear Tire & Rubber Company, a U.S. company with its principal place of business in Ohio, and three of its wholly-owned subsidiaries: Goodyear Luxembourg Tires SA, a Luxembourg corporation with its principal place of business in Colmar-Berg, Luxembourg; Goodyear Lastilkeri T.A.S., a Turkish corporation with its principal place of business in Turkey; and Goodyear Dunlop Tires France, a French corporation with its principal place of business in France. All these companies are part of an integrated distribution system managed by Goodyear US. Goodyear US did not dispute jurisdiction in North Carolina. The foreign companies, however, moved to dismiss the case arguing that there were no sufficient contacts with the forum state to support the exercise of personal jurisdiction over them under North Carolina law and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The oral arguments took place in January 11, 2011, and now the Supreme Court will have to revisit its scarce precedents on the issue (*“Helicopteros Nacionales de Colombia v. Hall (Helicol)”*, 466 U.S. 408 (1984); and *“Asahi Metal Industry Co. v. Superior Court”*, 480 U.S. 102 (1987)).

<sup>19</sup> The most relevant, beyond class actions, are: extensive pre-trial discovery, jury trial, punitive damages and the “American rule” regarding costs allocation.

conflicts involving large numbers of people.<sup>20</sup> For the purpose of this paper, I will focus on the FRCP 23.

Even though the origins of this kind of representative lawsuits in the US can be traced to the antique English jurisprudence of equity,<sup>21</sup> its current profile is not so old. There are two main historical developments that should be mentioned here in regard to the current formal structure of the rule. The first one happened in 1938, when the class actions were incorporated in the FRCP 23 during the general process of merger between law and equity jurisdictions in the US. Despite the fact that the FRCP 23 was by then considered a great improvement compared to how class actions were regulated in the equity jurisdiction,<sup>22</sup> the new rule was target of several criticisms. Probably the most relevant argument of the critics was that the FRCP 23 did not address the issue of how and to what extent the judgment would be binding over absent parties. Reform was considered as a necessary step, and that is how we reach the second (and major) historical event in this field: the amendments of 1966, which have defined the FRCP 23 current structure.<sup>23</sup>

Today we can see how the rule is just part of the more comprehensive system of civil procedure, included therein among other devices for managing proceedings with multiple parties.<sup>24</sup> Although it retains its “basic architecture” of the 1966 version, the FRCP 23 has undergone some important subsequent changes regarding notice requirements, interlocutory appeals, and the scope of control over class counsel. In addition, the Class Actions Fairness Act of 2005 created a federal venue on the basis of minimal diversity when it comes to deal with large stakes, interstate, state law class actions;<sup>25</sup> and the Public Securities Litigation Reform Act (PSLRA) introduced several modifications in that field of substantive law.

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<sup>20</sup> See Nicholas M. Pace “Class Actions in the United States of America: An Overview of the Process and the Empirical Literature”, FN2, available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/USA\\_\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/USA__National_Report.pdf) (explaining that “Only Mississippi lacks a class action process. Virginia allows common law class actions but does not have a specific statutory rule; Iowa and North Dakota follow the Uniform Class Action Rule; Nebraska and Wisconsin follow the Field Code rule on group litigation (California does as well but has judicially adopted the equivalent of FRCP 23); Missouri and North Carolina follow their own versions of the original form of FRCP 23 (this was the case for Georgia and West Virginia as well but in the last few years the two states have adopted the new version); and the remainder have incorporated, at least in modified form, the aspects of the current version of FRCP 23 that allows for opt-out classes”).

<sup>21</sup> Stephen C. Yeazell “From medieval group litigation to the modern class action”, Yale University Press, New Haven and London, 1987, pp. 38 -71.

<sup>22</sup> First by Equity Rule 48 (1833), and then by Equity Rule 38 (1912).

<sup>23</sup> See Samuel Issacharoff “Governance and Legitimacy in the Law of Class Actions”, 1999 Sup. Ct. Rev. 337, 391 (1999) (arguing that the 1966 reform “created for the first time a formal structured inquiry that allows courts to determine when aggregate treatment is appropriate”).

<sup>24</sup> Section IV “Parties”, FRCP 17 to 25.

<sup>25</sup> Jack H. Friedental, Arthur R. Miller, John E. Sexton and Helen Hershkoff “Civil Procedure”, 9th Ed., Thomson-West, St. Paul, Minn, 2008, p. 387.

The general structure of the FRCP 23 is very well known and I will not repeat it here. What we do need to keep in mind is that class actions are not the only mechanism available in the US to deal with aggregate litigation (though they are the most important one).<sup>26</sup>

**ii. Constitutional collective standing to sue in Argentina, the CPA and the plain jurisprudential reception of the US federal class actions**

Argentina is a federal country, whose central state coexists with 23 local states called Provinces and with the City of Buenos Aires, which has a very particular status already recognized by the SCJA. Similar to what happens in the US, the powers of the federal government are only those which had been delegated by local states. The political system assumes that everything not expressly delegated remains in hands of the latter.<sup>27</sup> As far as we are concerned for the analysis that follows, we should take into account that art. 5 of the AFC establishes as a condition for recognizing the autonomy of the Provinces that they must organize their own justice administration system, a task that includes the enactment of procedural regulations.

Regarding aggregate litigation, it is not possible to find in Argentina a comprehensive procedural mechanism to face conflicts involving large groups of people. Not even at the local level.<sup>28</sup> The lack of adequate procedural devices at the federal level is particularly problematic due to the fact that, since the 1994 amendment to the AFC, the standing to sue in order to

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<sup>26</sup> See Richard A. Nagareda *"The Law of Class Actions and Other Aggregate Litigation"*, Foundation Press, 2009, pp. 25-41. See also Edward F. Sherman *"Transnational Perspectives Regarding the Federal Rules of Civil Procedure"*, 56 J. Legal Educ. 510, 519 (2006) (arguing that *"Other countries have somewhat similar procedures, but the American devices allow greater flexibility in deviating from the traditional single-party-on-each-side model. American aggregation devices allow consolidation of cases not always permitted in other countries and class actions that far exceed the limited forms of group or representative proceedings in other countries"*). We will see that nowadays the last assertion is not completely accurate.

<sup>27</sup> See Alberto Molinaro's explanation in John F. Molloy *"Miami Conference Summary of Presentations"*, 20 Ariz. J. Int'l & Comp. L. 47, 49 (2003) (stating that in Argentina *"The founding fathers of our country took inspiration from the U.S. Constitution. Thus, our system evolved in the same way as the U.S. system in that states, which we call 'provinces', existed before the federal government. These provinces got together in a Congress and adopted a constitution. In contrast to Argentina, the governmental structure in Brazil, although also a federal republic, evolved in a different fashion. Brazil started as a monarchy, an empire, and turned into a federal republic"*).

<sup>28</sup> There are several local statutes dealing with collective procedural devices in the Argentina's Provinces. However, none of them provide a coherent and comprehensive system to face mass conflicts. The recent modification to the *"amparo"* proceeding in Buenos Aires Province can be seen as an example of that (Act N° 14.912, introducing modifications to the Act. 13.928). Although it still lacks a systemic structure, the current version of the statute can be considered as an improvement because -among other modifications- it contemplates therein the idea of adequacy of representation for the first time in the Province (art. 7). I have criticized the former version of the Act due to its lack of consistency and particularly due to the absence of provisions regarding that critical requirement of representative proceedings (see Francisco Verbic *"El proceso colectivo en la nueva ley de amparo de la Provincia de Buenos Aires. Falta de visión sistémica y un oportuno veto parcial del Poder Ejecutivo"*, L.L. Buenos Aires 2009, 235).

enforce collective rights has acquired constitutional pedigree in that country, as well as some substantive rights that can be labeled as “collective”.<sup>29</sup>

Since 1994, art. 43, 2<sup>nd</sup> paragraph of the AFC explicitly recognizes that different private social actors (the “affected” person and certain kind of NGOs) and a governmental institution (the ombudsman) have the right to bring “amparo colectivo” on behalf of groups and against “any kind of discrimination and with regard to the rights that protect the environment, the free competition, users and consumers, as well as rights of collective incidence in general”.<sup>30</sup> Art. 86 of the AFC, in turn, is even more explicit about the ombudsman (it plainly states that the figure “has standing to sue”).<sup>31</sup> On top of that, art. 42 of the AFC (also incorporated in the text by the 1994 amendment) recognizes several consumers and users’ substantive rights like equal treatment, health, economic interests, access to adequate information and freedom of choice, among others.<sup>32</sup>

The only federal regulations available to deal with conflicts involving large groups of people in Argentina are the General Environment Act N° 25.675 and the CPA.<sup>33</sup> Both of them have been passed by Congress and can be characterized as “substantive” laws. However, in both of them we can find certain isolated procedural provisions applicable, in principle, to face collective conflicts involving those particular areas of substantive law. The CPA was originally enacted in 1993 and has suffered several minor reforms regarding its substantive content until 2008,<sup>34</sup> when the Act N° 26.361 introduced relevant modifications, including several provisions on aggregate litigation. It is important to clarify that even though is for the provinces to enact procedural provisions according to art. 5 of the AFC, the SCJA has long

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<sup>29</sup> For an explanation of the problem, see Eduardo D. Oteiza “La constitucionalización de los derechos colectivos y la ausencia de un proceso que los ‘ampare’”, in Eduardo Oteiza (coordinator) “Procesos Colectivos”, Rubinzal-Culzoni Ed., Santa Fe, 2006. For a survey of some of the most relevant precedents in the area of collective rights in Argentina and further discussion about the problems entailed in the absence of adequate procedural means, particularly after the 1994 amendment to the AFC, see Leandro J. Giannini “La Tutela Colectiva de Derechos Individuales Homogéneos”, Librería Editora Platense, La Plata, 2007; José M. Salgado “La corte y la construcción del caso colectivo”, L.L. 2007-D, 787; Leandro Ardoy “La defensa de los intereses colectivos. Su evolución jurisprudencial”, D.J. 2007-I, 1; Francisco Verbic “Procesos Colectivos”, Astrea Ed., Buenos Aires, 2007.

<sup>30</sup> Art. 43, 2<sup>nd</sup> parag. FCA: “Podrán interponer esta acción contra cualquier forma de discriminación y en lo relativo a los derechos que protegen al ambiente, a la competencia, al usuario y al consumidor, así como a los derechos de incidencia colectiva en general, el afectado, el defensor del pueblo y las asociaciones que propendan a esos fines, registradas conforme a la ley, la que determinará los requisitos y formas de su organización”.

<sup>31</sup> Art. 86, 2<sup>nd</sup> parag. FCA: “El Defensor del Pueblo tiene legitimación procesal. Es designado y removido por el Congreso con el voto de las dos terceras partes de los miembros presentes de cada una de las Cámaras. Goza de las inmunidades y privilegios de los legisladores. Durará en su cargo cinco años, pudiendo ser nuevamente designado por una sola vez”.

<sup>32</sup> Art. 42 FCA: “Los consumidores y usuarios de bienes y servicios tienen derecho, en la relación de consumo, a la protección de su salud, seguridad e intereses económicos; a una información adecuada y veraz; a la libertad de elección, y a condiciones de trato equitativo y digno. Las autoridades proveerán a la protección de esos derechos, a la educación para el consumo, a la defensa de la competencia contra toda forma de distorsión de los mercados, al control de los monopolios naturales y legales, al de la calidad y eficiencia de los servicios públicos, y a la constitución de asociaciones de consumidores y de usuarios.

La legislación establecerá procedimientos eficaces para la prevención y solución de conflictos, y los marcos regulatorios de los servicios públicos de competencia nacional, previendo la necesaria participación de las asociaciones de consumidores y usuarios y de las provincias interesadas, en los organismos de control”.

<sup>33</sup> It is worthwhile to note that, after the amendment of 1994, art. 41 of the AFC recognizes the right to a healthy environment.



since recognized the federal government's power to do that when such regulations are deemed absolutely indispensable to enforce substantive rights.<sup>35</sup>

No general description of the law of aggregate litigation in Argentina would be accurate if it does not address the striking opinion issued by the SCJA at the beginnings of 2009 in the case "*Halabi*".<sup>36</sup> Ernesto Halabi was a lawyer and user of mobile phones and internet services, who filed an "amparo" seeking the declaration of unconstitutionality of the federal statute that had allowed the revision of private phone communications, without previous judicial order.<sup>37</sup> The case reached the SCJA with the substantive issue already solved. The Court of Appeals had declared the Act unconstitutional and extended the binding effects of the solution to all users of the telecommunication system who were similarly situated. That was the only issue to be discussed in the SCJA, i.e. the collective binding effects of the Court of Appeals' opinion.

When deciding the case, as I have already mentioned in the Introduction, the majority of the SCJA asserted that it is possible to file in Argentina class actions (which it labeled "*acción colectiva*") with analogous characteristics and effects to the US class actions, and plainly held that -even in the absence of legislation- art. 43 AFC provisions are clearly operative and must be enforced by the courts. Moreover, in this opinion the SCJA enunciated the constitutional requirements for obtaining a valid opinion under due process of law standards. After underscoring the lack of an adequate procedural regulation enacted by Congress on aggregate litigation, the court made some remarks to provide guidance in order to protect the due process of law of absent members in future uses of the "*acción colectiva*".<sup>38</sup> In this respect, the SCJA held that the "*formal admissibility*" of any "*acción colectiva*" must be subject to the fulfillment of the following requirements: (i) there has to be a precise identification of the group of people that is being represented in the case; (ii) the plaintiff must be an adequate representative; (iii) the claim has to focus on questions of fact or law common and homogeneous to the whole class; (iv) there has to be a proceeding capable of providing adequate notice to all people that

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<sup>34</sup> Acts N° 24.568, N° 24.787 and N° 24.999.

<sup>35</sup> CSJN *in re "Correa c/Barros"*, opinion issued in 1923, *Fallos* 138:154. For more information about the separation of powers to enact norms of procedure in Argentinean federal system, see the classic work of Amílcar A. Mercader "*Poderes de la Nación y de las provincias para instituir normas de procedimiento*", Ed. Jurídica Argentina, Buenos Aires, 1939.

<sup>36</sup> See *supra* FN 7. Though striking, the opinion was not unexpected. By then, the SCJA had already issued some opinions regarding different aspects of aggregate litigation. Most of these opinions had been rendered in environmental and human rights cases. Moreover, the rationale of the majority opinion in "*Halabi*" had been insinuated, at least in its more relevant aspects, in some of the dissenting opinions on those cases. See "*Mendoza I*" (case M.1569.XL, opinion issued on 06/20/06), "*Asociación de Superficiarios de la Patagonia I*" (case A.1274.XXXIX, opinion issued 08/29/06), "*Defensoría del Pueblo*" (case D. 859. XXXVI, opinion issued 10/31/06); "*Mujeres por la Vida*" (case M.970.XXXIX, opinion issued 10/31/06), "*Mendoza II*" (case M.1569.XL, opinion issued 07/08//08) and "*Asociación de Superficiarios de la Patagonia II*" (case A.1274.XXXIX, opinion issued 08/26/08).

<sup>37</sup> Act N° 25.873 and Executive Decree N° 1563/04 (the media referred to the Act as "the spy statute").

<sup>38</sup> Parag. 20° of the majority opinion.

might have an interest in the outcome of the case; (v) that proceeding has to provide the members of the class an opportunity to opt-out or to intervene; and (vi) there should be adequate publicity and advertising of the action in order to avoid two different but related problems: on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action; and on the other, the risk of different or incompatible opinions on identical issues. The CPA already contained some provisions on these different topics, but the interesting feature of *"Halabi"* is that the SCJA accorded them constitutional status.<sup>39</sup>

It should be mentioned, however, that there is one issue that may bring about some difficulties in the future. It has to do with cases involving positive value claims. The SCJA asserted that art. 43 AFC is operative and that it is an obligation for the courts to enforce it, true. The problem is that this holding was qualified in the same opinion: the court continued saying that the enforcement should proceed *"when there is clear evidence about the harm to a fundamental right and to the access to justice of its holder"*.<sup>40</sup> According to this statement, those cases involving positive value claims would not qualify to be litigated in a representative basis (because there is no harm to the access to justice right of its holder, who has sufficient interest at stake to file an individual lawsuit by his own). However, when explaining this principle the majority was not so rigid. It held that, even if as a general rule the plaintiff has to show that the individual suit is not *"fully justified"*, this condition does not apply in cases where there is a predominance of issues related to certain subject matters (environment, consumers and health) or when the affected group can be considered as a disadvantaged one (*"traditionally relegated or weakly protected"* in the words of the court).<sup>41</sup> What seems to be clear is that, absent those exceptions, the SCJA is not prepared yet to welcome aggregate litigation in Argentina.

### **iii. Brazil, its Federal Constitution, the Public Action Civil Act and the Consumer Defense Code**

Brazil is a federal country as well, integrated by a central government, 26 local states and more than five thousand municipalities.<sup>42</sup> However, contrary to what happens in both Argentina and the US, there is only one code of civil procedure enacted by the federal

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<sup>39</sup> See Ricardo Lorenzetti *"Justicia colectiva"*, Rubinzal Culzoni Ed., Santa Fe, 2010, pp. 275-276 (arguing that the CPA establish an *"acción colectiva"*, but in a *"very insufficient way taking into account the abundant comparative law materials completely omitted by the legislator"*).

<sup>40</sup> Parag. 13° of the majority opinion.

<sup>41</sup> *Ibidem*.

<sup>42</sup> Art. 1 Constituição da República Federativa do Brasil de 1988.

government, which applies in the whole country (hereinafter “BCCP”). As we will see, Brazil is one of the few civil law countries that have developed a sophisticated procedural regime for protecting collective rights, and the first one to introduce that kind of regulation in Latin America.<sup>43</sup>

According to Gidi it is possible to find the origins of the Brazilian system on the studies of Italian scholars during the 70s.<sup>44</sup> The first statute dealing with this kind of procedural rules in regard to protection of consumers was the Public Action Civil Act, enacted in 1985 (hereinafter “PACA”).<sup>45</sup> Since then, the most relevant developments came along with the new Federal Constitution of 1988 and the several substantive and procedural group rights included therein;<sup>46</sup> and subsequently with the CDC of 1990.<sup>47</sup> Nowadays, representative procedures in Brazil have their own particular rules, and there is a strong movement toward its codification.<sup>48</sup> The regime can be considered as a sub-system within the more comprehensive system of civil procedure and has received the name of “collective civil procedure”.<sup>49</sup> What is more, according to some authors this discipline has even developed its own particular principles of interpretation.<sup>50</sup>

The cornerstone of the Brazilian system can be found in art. 81 of the CDC, which provides that judicial enforcement of consumers’ rights can be sought on both individual and collective basis. The particular feature is that collective redress is only available when the defendant has violated at least one of the three categories of substantive collective rights

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<sup>43</sup> Ada Pellegrini Grinover “*Ações coletivas Ibero-Americanas: novas questões sobre a legitimacao e a coisa julgada*”, Report for Brazil to the International Convention of Procedural Law, Tor Vergata University, Rome, May 2002.

<sup>44</sup> Antonio Gidi “*Class Actions in Brazil. A Model for Civil Law Countries*”, 51 Am. J. Comp. L. 311, 324. See the classic work of Michele Taruffo “*I Limiti Soggettivi del Giudicato e le Class Actions*”, 24 Rivista di Diritto Processuale 618 (1969) (considered as the first work on class actions by a civil law scholar, see Fabio Coco “*Class actions in Italy. Where the rubber meets the road*”, October 2006, FN 47, available at <http://www.luiss.it/siti/media/1/20061106-class-actions-coco.pdf>).

<sup>45</sup> Lei da Ação Civil Pública, Lei N° 7347, de 24 de julho de 1985. Prior to this Act, Brazil had incorporated the popular action (*actio popularis*), which allows any citizen to file a lawsuit in order to annul certain administrative acts (1934 Constitution, currently art. 5.LXXIII of the 1988 Constitution; Lei da Ação Popular, Lei n. 4.717, de 29 de junho de 1965).

<sup>46</sup> Among others: art. 5.XXI, which recognizes the standing to sue of associative entities; art. 5.XXXII, which states that the government will enact regulations to protect consumers; art. 5.XXXIII, recognizing the right of access to information on both individual and collective basis; art. 5.LXIX, implementing the *mandado de segurança* as a expeditive procedural remedy to protect those liquid and uncontroverted rights that cannot be enforced by means of habeas corpus or habeas data (art. 5.LXX, in turn, states that a collective *mandado de segurança* can be brought by political parties, labor unions and associations with at least one year since their incorporation); the already mentioned art. 5.LXXIII, which provides for the *actio popularis*; and art. 129.III, which recognizes among the competences of the Public Ministry that of promoting the public civil action.

<sup>47</sup> Lei N° 8078, de 11 de Setembro de 1990.

<sup>48</sup> For a revision of two projects in this line, see Gregório Assagra de Almeida “*Codificação do Direito Processual Coletivo Brasileiro*”, Del Rey Ed., Belo Horizonte, 2007, pp. 100-125.

<sup>49</sup> See Carolina Gallotti “*Fase Inicial do Cumprimento de Sentença – Lei N. 11.232, de 22.12.2005*”, in Patricia Borba Marchetto “*Direito Processual Civil*”, Juarez de Oliveira Ed., Sao Paulo, 2009, pp. 76-77. See also Gregório Assagra de Almeida “*Codificação do Direito Processual Coletivo Brasileiro*”, Del Rey Ed., Belo Horizonte, 2007, p. 48 [(arguing that the CDC and the PACA conform one sub-system, which he calls “*comun*” (ordinary); while the rules on diffuse and concentrated controls of constitutionality conform another microsystem, which he calls “*especial*” (special)].

<sup>50</sup> See Gregório Assagra de Almeida “*Codificação do Direito Processual Coletivo Brasileiro*”, Del Rey Ed., Belo Horizonte, 2007, pp. 64-68. See also Ada Pellegrini Grinover “*Derecho Procesal Colectivo*”, RDP, 2006-2, pp. 387 ff.

described in that same article.<sup>51</sup> The first typified category is that of “diffuse rights”. It encompasses transindividual and indivisible rights belonging to a group of undetermined individuals who are related among them by virtue of factual circumstances.<sup>52</sup> The second type is labeled as “collective”. They are transindividual and indivisible rights as well, but differ from the diffuse in that they belong to a group, category or class of persons related among them or with the opposing party by virtue of a baseline legal relationship.<sup>53</sup> Finally, the CDC recognizes a third type of collective rights, designated as “individual homogeneous” and described simply as those “*resulting from a common origin*”.<sup>54</sup> This last category includes individual and perfectly divisible rights, collectivized only for litigation purposes. That is why scholars referred to them as “*accidentally collective*”, whereas the other two categories are considered as involving “*essentially collective*” rights.<sup>55</sup>

While the difference between the first two categories is not really dispositive (at least for practical purposes),<sup>56</sup> it is important to distinguish them from the third one because the CDC contains certain specific provisions that apply only when individual homogeneous rights are in dispute.<sup>57</sup> The divisibility of the protected interests has always been the basic characteristic to make that relevant distinction. Instead, the possibility of individualize the members of the group only matters in order to distinguish between the two “*essentially collective*” types of rights.<sup>58</sup>

Beyond the provisions concerning standing to sue, available remedies and scope of closure that I will analyze in more detail later, the general rules of the CDC regarding collective procedure regulate costs, attorney’s fees,<sup>59</sup> sanctions in case of bad faith litigation,<sup>60</sup> and *lis pendens*.<sup>61</sup> There is also a specific article stating that both the rules contained in the BCCP and

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<sup>51</sup> See Antonio Augusto Mello de Camargo Ferraz and Joao Lopes Guimaraes Júnior “*A Necessária Elaboracao de Uma Nova Doutrina de Ministério Público, Compatível com seu Atual Perfil Constitucional*”, in Antonio Augusto Mello de Camargo Ferraz “*Ministério Público. Instituição e Processo*”, Atlas Ed. Sao Paulo, 1977, 26 (explaining that by then in Brazil “*the principal media of mass communication, production and consume are operating in a mass scale*” leading to the emergence of different kind of groups with particular interests of their own).

<sup>52</sup> Art. 81, parag. único, I, CDC.

<sup>53</sup> Art. 81, parag. único, II, CDC.

<sup>54</sup> Art. 81, parag. único, III, CDC.

<sup>55</sup> This distinction between *essential* and *accidental* collective rights is taken from the classic work of José C. Barbosa Moreira “*Tutela jurisdiccional dos interesses coletivos ou difusos*”, in “*Temas de direito processual (Terceira Série)*”, São Paulo, Saraiva, 1984, p. 196.

<sup>56</sup> The Model Code of Collective Proceedings developed by the Iberoamerican Institute of Procedural Law has merged both categories under the label of *diffuse rights* (art. 1).

<sup>57</sup> Arts. 91-100 CDC.

<sup>58</sup> See Luiz Paulo da Silva Araújo Filho “*Sobre a distinção entre interesses coletivos e interesses individuais homogêneos*”, in Luiz Fux, Nelson Nery Jr. and Teresa Arruda Alvim Wambier “*Processo em Constituição*”, Revista dos Tribunais Ed., Sao Paulo, 2006, pp. 78-79, 82.

<sup>59</sup> Art. 87 CDC.

<sup>60</sup> Art. 87, parag. Único CDC.

<sup>61</sup> Art. 104. CDC provides that those collective actions established in paragraphs I and II and in the only paragraph of art. 81 do not generate *lis pendens* over individual actions. However, for individual plaintiffs the possibility of benefiting from the *res judicata* effects of a favorable judgment in the collective action is subject to a condition: they have to ask for a stay in the proceedings within a 30 days period specified in that article.

the PACA are applicable in this field to the extent that they do not contravene the content of the CDC.<sup>62</sup> It is important to note that the CDC also introduced a modification in the PACA, by virtue of which CDC's rules apply to the proceedings established by that Act.<sup>63</sup> Hence, we are facing a complex system in which all the procedural provisions of the CDC are applicable to any kind of proceedings initiated within the framework of art. 1 of the PACA (harms caused to the environment, consumers, urban landscape, artistic, aesthetic, historic and touristic goods, and breach of the economic order); and vice versa, i.e. the provisions of the PACA apply to the proceedings promoted under the rules of the CDC.<sup>64</sup>

**b. Who is authorized to file the representative action?**

**i. United States and the (nonexistent) provisions of the FRCP 23 regarding standing to sue**

The FRCP 23 does not contain special provisions about standing to sue. Any member of the group can file a class action in the US, provided that she can be an adequate representative and that her claims are typical of the claims of other class members.<sup>65</sup> In fact, it has been recognized that class actions by themselves do not operate as a mechanism to amplify or even change at all the standing to sue of the named representative.<sup>66</sup> The only exception to this rule can be found in the field of securities class actions, where the PSLRA enacted in 1995 established a presumption in favor of plaintiffs with large holdings in the defendant's securities.<sup>67</sup> Beyond this particular field, the representative has to show (as anybody else who

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<sup>62</sup> Art. 90 CDC.

<sup>63</sup> Art. 117 CDC, which incorporated a new art. 21 in the PACA. See Gregório Assagra de Almeida *"Codificacao do Direito Processual Coletivo Brasileiro"*, Del Rey Ed., Belo Horizonte, 2007, pp. 79-80 (arguing that this reform was *"the third big historical moment"* in the field of collective procedure in Brazil).

<sup>64</sup> See Antonio Gidi *"Class Actions in Brazil. A Model for Civil Law Countries"*, 51 Am. J. Comp. L. 311, 328 (2003) (explaining that, even though the rules are set forth in the CDC, *"the class proceeding embodied in this piece of legislation is 'trans-substantive' in character and so is applicable to every kind of group right amenable to class litigation"*); see also Gregório Assagra de Almeida *"Codificacao do Direito Processual Coletivo Brasileiro"*, Del Rey Ed., Belo Horizonte, 2007, p. 67 (arguing that the CDC and the PACA entail general rules that apply to any kind of representative procedure in that territory).

<sup>65</sup> Samuel Issacharoff and Geoffrey P. Miller *"Will Aggregate Litigation Come to Europe?"* 62 Vand. L. Rev. 179, 192 (2009).

<sup>66</sup> Linda Mullenix *"New Trends in Standing and Res Judicata in Collective Suits"*, General Report to the XIII International Convention on Procedural Law (Salvador Bahia, Brazil, 09/16-22/07), pp. 21-22.

<sup>67</sup> See Adnrew S. Gold *"Experimenting with the Lead Plaintiff Selection Process in Securities Class Actions: A Suggestion for PSLRA Reform"*, 57 DePaul L. Rev. 447, 449-450 (2008) (explaining that *"Prior to the PSLRA, courts typically chose class action lead plaintiffs on a first-come, first-serve basis. The first to file became class representative. This resulted in a race to the courthouse, in which claims were sometimes triggered by a drop in the defendant's stock price, thus increasing the risk of nonmeritorious suits. It also produced a largely lawyer-driven form of litigation in the securities class action context. Lawyers sought out their client, not the other way around. Class counsel would often make the important litigation decisions—including those on settlement terms—with little outside monitoring"*). See also Joseph A. Grundfest and Michael A. Perino *"Ten Things We Know and Ten Things We Don't Know About the Private Securities Litigation Reform Act of 1995"*, joint written testimony before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban

wants to provoke a judicial intervention in a particular case) that she has suffered an “injury in fact” and that she has a “personal stake” in the outcome that differentiates her from the public at large.<sup>68</sup> This is the dominant view on the issue: the requirement of being a member of the class is analogized to a standing requirement.<sup>69</sup>

These principles remain unaltered even in the field of organizational standing. The Supreme Court has recently delivered an opinion in a case involving an environmental organization seeking injunctive relief against the U.S. Forest Service. In *“Summers”*, the claim was grounded on alleged violations in the administrative proceedings that preceded a salvage sale of fire-damaged federal lands (the “Burnt Ridge Project”); and the Court plainly applied those general principles to reject the standing to sue invoked by the Earth Island Institute.<sup>70</sup>

## **ii. The CPA in Argentina and more about “Halabi”**

To some extent, the CPA in its current version could be considered as a reasonable regulation, within the field of consumers’ rights, of the standing to sue already recognized by arts. 43 and 86 of the AFC. Art. 52 of the CPA says that the action *“correspond to the consumer or user by her own right, the associations of consumers and users authorized according to the provisions of art. 56 of this act, the national or local authority of application, the ombudsman and the Public Ministry”*.<sup>71</sup> That article also authorizes associations and individuals to intervene in the proceedings, subject to leave of the court.<sup>72</sup> Lastly, it rules that in case of voluntary dismissal or abandonment of the

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Affairs, United States Senate, July 24, 1997, available at <http://securities.stanford.edu/research/articles/19970723sen1.html> (assessing several critical points of this field of litigation, and some of the pros and cons of the Act soon after it was passed by Congress).

<sup>68</sup> Richard Marcus, Martin H. Redish and Edward F. Sherman *“Civil Procedure. A Modern Approach”*, 4th Ed., Thomson-West, St. Paul, Minnesota, 2005, pp. 93-94.

<sup>69</sup> Jack H. Friedenthal, Arthur R. Miller, John E. Sexton and Helen Hershkoff *“Civil Procedure”*, 9th Ed., Thomson-West, St. Paul, Minn, 2008, p. 390.

<sup>70</sup> *“Summers v. Earth Island Institute”*, 129 S.Ct. 1142, 1149 (U.S. 2009) (internal quotation marks omitted). The majority of the Court held that: *“a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury”*. See also *“Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.”* 528 U.S. 167, 169 (U.S. 2000) (holding that *“An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires individual members’ participation in the lawsuit”*). For further references, see Bradford Mank *“Summers v. Earth Island Institute Rejects Probabilistic Standing, but a ‘Realistic Threat’ of Harm Is a Better Standing Test”*, 40 *Env’tl. L.* 89, 137 (2010) (discussing the decision and concluding that it *“purported to prohibit organizational standing based upon the statistical probability that some of an organization’s members will likely be harmed in the near future by the defendant’s allegedly illegal actions”*); and Brad Seligman *“Using Law for Change: Litigation to Challenge Systemic Violations”*, 44 *Clearinghouse Rev.* 483, 486-487 (2011) (explaining that *“Neither individuals nor organizations have standing if all they claim is a generalized interest in the law being followed or in the environment. Rather, for an organization to have standing, it must show that either it or its members have suffered or may suffer actual injury from the challenged conduct”*).

<sup>71</sup> Art. 52 CPA, 1st parag.

<sup>72</sup> Art. 52 CPA, 2nd parag. In order to grant this permission the judge has to assess whether they would have had standing to file the action in the first place.

action by the authorized associations, the Public Ministry will assume the role of representative party in order to continue with the proceedings.<sup>73</sup> Let us now review the scope of these provisions.

First of all, we have the standing of the individual person. The idea of consumers and users acting on behalf of a group of people similarly situated can be considered to be already allowed in Argentina by the time it was incorporated in the CPA through the Act N° 26.361. That had happened thanks to the meaning accorded by courts to the expression “the affected” included in art. 43, 2<sup>nd</sup> parag. of the AFC.<sup>74</sup> The CPA casts some doubts on the issue when it states that individuals can exercise this standing “*by her own right*”. This expression was incorporated by the Act N° 26.361, and could be interpreted as allowing individuals only to file ordinary individual actions aimed to protect exclusively their particular interests. Nothing in the congressional record helps to clarify what the legislators were thinking about when they included that wording. However, it is apparent that this provision of the CPA cannot be interpreted in a sense that would amount to a denial of the constitutional right established in art. 43, 2<sup>nd</sup> parag. AFC. Moreover, a restrictive interpretation of this kind might raise another sort of constitutional challenge on grounds of equal protection under the law (art. 16 FCA), because it would deprive only individual consumers and users of collective standing to sue while that standing remains free of restrictions for individuals in other fields of law.

What about “*Halabi*”? Plaintiff’s collective standing to sue was recognized in that case on the ground of his status as a user of telephone and internet services. According to the majority, Halabi’s claim was intended to enforce “*collective incidence rights concerning individual homogeneous interests*” and –precisely because of that- it was not circumscribed to enforce just his own individual right to privacy and professional secret. Due to the kind of rights involved in the dispute, the claim was “*representative of the interests of all users of telecommunication services, as well as those of all lawyers*”.<sup>75</sup> Hence, according to the majority of the SCJA, the solution had to be extended to the whole group of affected people. In my view, however, it is difficult to find plausible reasons to explain why and how the majority could accord collective *res judicata* effects to the declaration of unconstitutionality. As one can tell from the plaintiff’s opinion in a book

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<sup>73</sup> Art. 52 CPA, 4th parag

<sup>74</sup> See “*Monner Sans c/ P.E.N.*”, J.Fed.Cont. Adm. N° 1, opinion issued 10/30/97, L.L. 1998-D-219; “*Yousseffian, Martin c. Secretaría de Comunicaciones*”, CNac.Fed.Cont.Adm, sala IV, opinion issued 06/23/98; “*Monner Sans, Ricardo c/ Fuerza Aérea Argentina*”, SCJA, opinion issued 09/26/06, D.J. 10/25/06, 564 (only Justice Argibay opinion, the majority denied the petition of certiorari).

<sup>75</sup> Parag. 14° of the majority opinion.

he published soon after the judgment, he never asked for a collective redress nor invoked any kind of collective standing to sue.<sup>76</sup>

In the second place we have the standing to sue recognized on behalf of certain associations. It is worthwhile to mention that this collective standing was part of the original text of the CPA, enacted prior to the 1994 amendment to the AFC. A couple of comments about its scope are necessary to understand how it works. On the one hand, we have to bear in mind that these private organizations have to be incorporated as juridical persons and need to obtain an authorization from the government in order to be able to represent the interests of consumers and users.<sup>77</sup> On the other hand, it is equally relevant to note that art. 52 of the CPA establishes a formal and abstract control of the organization in order to decide whether to allow its participation in judicial proceedings: the judge is directed only to check whether the institutional mission of the NGO match the content of the action, and whether it is correctly registered under the applicable law (which demands, among other requirements, that the organization avoids taking part on partisan political activities, remains independent in regard to any kind of professional or commercial activity, and does not receive donations or any sort of contributions from commercial, industrial or services corporations).<sup>78</sup>

The third and last provision of the CPA strictly related to the abovementioned constitutional framework is the express recognition of the ombudsman's collective standing to sue. Like the reference to the individuals capacity to file actions "*by her own right*", that of the ombudsman had not been included in the original version of the CPA and was inserted therein by the Act N° 26.361. Notwithstanding the clear wording of art. 86, 2<sup>nd</sup> parag. of the AFC ("*The ombudsman has standing to sue*"), by the time of the CPA reform the SCJA had systematically denied the ombudsman's standing in this area of substantive law when the actions were aimed to protect "*economic and purely individual rights*".<sup>79</sup> The incorporation of the constitutional right to sue in the text of the CPA might be understood as the legislature's answer to that line of precedents. However, it is far from clear which is the scope of the new legal authorization. Particularly doubtful is whether, even in the face of the now crystal clear content of the CPA, the ombudsman will be allowed to get involved in collective actions seeking economic reparation for individuals. As I have already mentioned, in "*Halabi*" the majority recognized

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<sup>76</sup> Ernesto Halabi *"El derecho a la Intimidad y la Ley Espía"*, Utsupra Ed., Buenos Aires, 2009.

<sup>77</sup> Arts. 55 and 56 CPA.

<sup>78</sup> Art. 57 CPA.

<sup>79</sup> I have analyzed elsewhere the precedents of the SCJA in this field, showing that –by then– the reasons provided to deny the ombudsman's standing to sue were almost absurd (see Francisco Verbic *"La (negada) legitimación activa del defensor del pueblo de la nación para accionar en defensa de derechos de incidencia colectiva"*, Revista de Derecho Procesal Rubinzal Culzoni, 2007-I).



that art. 43, 2<sup>nd</sup> parag. of the AFC contemplates *“collective incidence rights related to homogeneous individual interests”* (the influence of the Brazilian system in this regard is evident). What matters the most here is that the SCJA did not establish any difference on grounds of the economic content of those rights. Instead, it plainly held that, even in the absence of legislation, art. 43 AFC is *“clearly operative and it is an obligation of the courts to enforce it when there is a clear showing of the breach of a fundamental right and of the access to justice of its holder”*.<sup>80</sup> Justice Highton de Nolasco subscribed that holding with the majority, but at the same time made a “reservation” in respect to collective actions brought by the ombudsman in order to protect economic and purely individual rights.<sup>81</sup>

An opinion rendered some months after *“Halabi”* only serves to increase the uncertainties in this regard.<sup>82</sup> The case *“Defensor del Pueblo de la Nación”* involved a user of a public service and the ombudsman as plaintiffs, challenging an administrative regulation setting out the way of charging apartment buildings for water consumption.<sup>83</sup> They obtained a favorable opinion, but during the enforcement proceedings the defendant challenged the scope of *res judicata* of the solution. He argued that it should only benefit the owners of the apartments individually named in the action, while the ombudsman claimed that it should benefit all users situated in the same circumstances. The majority of the Court reversed the opinion of the Court of Appeals that had limited the effects of the judgment to the individualized apartments. Adopting the opinion of the General Procurator (head of a sector of the Argentinean Public Ministry that is required to intervene in certain cases before the SCJA), the majority held that *“the implicit recognition of the ombudsman’s standing to sue presupposes the existence of a special relation between him and the debated issues and also that the consequences of the solution will produce juridical effects even though he is a different subject from those affected”*.<sup>84</sup> Otherwise, said the majority, the scope of the ombudsman’s intervention in these kind of procedures *“would be limited to accompany the user”*, and in this way would *“deprive of sense”* its participation as a guardian of collective rights.<sup>85</sup> The holding of this case makes a lot of sense within the constitutional and legal framework I have described so far. However, the opinion creates some confusion if we consider two things. On the one hand, it does not contain a single mention of *“Halabi”*

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<sup>80</sup> Parag. 12° of the majority opinion.

<sup>81</sup> Parag. 28° of the majority opinion.

<sup>82</sup> A book on aggregate litigation published by the Chief Justice of the SCJA 13 months after the decision in *“Halabi”* does not help to solve this particular puzzle (see Ricardo Lorenzetti *“Justicia colectiva”*, Rubinzal Culzoni Ed., Santa Fe, 2010, pp. 276-277).

<sup>83</sup> CSJN *“Defensor del Pueblo de la Nación c/ Estado Nacional - P.E.N. - M° de Eco. Obras y Serv. Púb. y otros s/ amparo ley 16.986”*, opinión issued 08/11/09, *Fallos* 332:1759.

<sup>84</sup> Parag. V of the General Procurator opinion.

(issued just 6 month before); and on the other, the dissenting opinion was entered by two of the judges that comprised the majority in “*Halabi*” (Chief Justice Lorenzetti and Justice Highton de Nolasco, the one that made the “reservation” in that opportunity).<sup>86</sup>

Beyond the three figures recognized in the AFC to act in the field of aggregate litigation (the consumer or user “affected”, the associations and the ombudsman), the CPA vested two other governmental actors with collective standing to sue; i.e. the national and local authorities of application, and the Public Ministry.

The last reform by Act 26.361 did not introduce major changes in the CPA regarding the authorities of application.<sup>87</sup> They exercise the control and supervision that is considered necessary to secure the correct application of the act, and they are also in charge of judging breaches of the law in this field according to certain administrative regulations and proceedings.<sup>88</sup> Even though the collective standing to sue of these administrative organs had been already recognized in the original version of the CPA, their participation in judicial proceedings on behalf of groups of consumers and users is almost nonexistent.<sup>89</sup>

Regarding the Public Ministry,<sup>90</sup> both its collective standing to sue and its mandatory role in these kinds of judicial proceedings as a guardian of the “general interest of the law” (when it does not participate exercising its standing) were already recognized in the original version of the CPA. The same happens with its mandatory role as named party in those cases where there is a voluntary dismissal or abandonment of the action by the authorized associations acting in that character.<sup>91</sup> It is worth to mention that the current constitutional status of the Public Ministry in Argentina provides an interesting background to allow an active participation of the figure in this field (after the 1994 amendment, the AFC expressly declared its autonomy and independence).<sup>92</sup> However, it is really difficult to find judicial decisions involving aggregate cases brought by that figure.<sup>93</sup>

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<sup>85</sup> *Ibidem*.

<sup>86</sup> The dissenting opinions rejected the extraordinary appeal on procedural grounds.

<sup>87</sup> The reform has only eliminated the possibility of delegating that role to local municipalities, an alternative that was available in the original version of the CPA.

<sup>88</sup> Arts. 41 to 44 CPA.

<sup>89</sup> See Gabriel A. Stiglitz “*Acciones colectivas de los consumidores. Legitimación de la autoridad de aplicación*”, L.L. 2004-D-1215.

<sup>90</sup> The Public Ministry is an institution that has no strict parallel in the US. For an brief overview of its meaning and the scope of its competence in civil law countries see Hugo Mattei, Teemu Ruskola and Antonio Gidi “*Schlesinger’s Comparative Law*”, 7th Edition, Foundation Press, NY, 2009, pp. 521-523.

<sup>91</sup> Art. 52 CPA, 4th parag.

<sup>92</sup> Art. 120 AFC.

<sup>93</sup> I have postulated elsewhere that the functional autonomy and economic autarchy of the federal Public Ministry, explicitly recognized by art. 120 of the AFC after the 1994 amendment, is a solid background to sustain an active participation of that

### iii. The situation in Brazil. Provisions regarding standing to sue in the Public Action Civil Act and the Consumer Defense Code

Art. 82 CDC, modified in 1995 by the Act N° 9.008, provides the list of social actors who are concurrently authorized to promote collective actions on behalf of diffuse and collective consumers' rights in Brazil. The list includes: (i) the Public Ministry, maybe the most active participant in this kind of lawsuits;<sup>94</sup> (ii) the Union, states, municipalities and the federal government; (iii) public entities and organisms meant to act on behalf of consumers' rights; and (iv) private associations, subject to certain conditions. These private associations have to be legally incorporated at least one year prior to the occurrence of the facts that trigger the action, and they have to include the protection of consumers' rights within their institutional mission. The former requirement, however, can be dispensed by the court when there is a manifest social interest showed by the extension of the damage or by the relevance of the rights involved in the dispute.

The provisions contained in art. 82 also apply to the action in protection of individual homogeneous rights.<sup>95</sup> However, two differences should be noted in respect to the rules that govern the proceedings in these cases. The first one has to do with the role of the Public Ministry: when it does not act as a named representative it must intervene to control the correct application of the law (similar to the role assumed by its Argentinean counterpart).<sup>96</sup> The second difference is that in this kind of proceedings the CDC expressly allows the intervention of those individuals whose rights are involved in the dispute.<sup>97</sup>

The CDC is complemented by art. 5 of the PACA, which vests with collective standing not only the four entities already mentioned, but also the Public Defense ("Defensoria Pública") and, since 2007, autarchic and public corporations.<sup>98</sup> It should be remembered here that the CDC and the PACA are interrelated by specific provisions included in the text of both statutes. Due to that particular feature of the Brazilian system, PACA's enumeration of entities with

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institution in the enforcement of collective rights (see Francisco Verbic *"Procesos Colectivos"*, Ed. Astrea, Buenos Aires, 2007, p. 235 ff).

<sup>94</sup> See Antonio Augusto Mello de Camargo Ferraz and Joao Lopes Guimaraes Júnior *"A Necessária Elaboração de Uma Nova Doutrina de Ministério Público, Compatível com seu Atual Perfil Constitucional"*, in Antonio Augusto Mello de Camargo Ferraz *"Ministério Público. Instituição e Processo"*, Atlas Ed. Sao Paulo, 1977, 26 (considering the decade of 1980 as *"the renaissance of the Public Ministry"* due to the new perspectives that arose in respect to its institutional evolution in the private field thanks to the enactment of the PACA). For a more comprehensive description of the role of the Public Ministry in the field of law enforcement, see Carlos Alberto de Salles *"Legitimidade para Agir: Desenho Processual da Atuação do Ministério Público"*, in Antonio Augusto Mello de Camargo Ferraz *"Ministério Público. Instituição e Processo"*, Atlas Ed. Sao Paulo, 1977, 228-274.

<sup>95</sup> Art. 91 CDC.

<sup>96</sup> Art. 92 CDC.

<sup>97</sup> Art. 94 CDC.

collective standing to sue apply in the context of lawsuits brought under the provisions of the CDC, and vice versa.

It is worthwhile to underline that the Brazilian system does not provide anything about judicial control of adequacy of representation. Even though the codification projects include provisions to make mandatory this prerequisite of the FRCP 23 class actions, some scholars think that it is incompatible with the Brazilian Federal Constitution and also with the current legal structure of the discipline. According to the critics, the adequacy of the plaintiff is decided in Brazil by legislative authorization and should be considered accomplished *ope legis*.<sup>99</sup> This position is not shared by the most prominent Brazilian specialists in the field,<sup>100</sup> but it is certainly widespread.

### c. Which are the available remedies?

#### i. United States

The structure of the FRCP 23 provides for different types of class actions. Albeit each of them has particular features (some provided by the text of the rule, others developed by the courts), it is clear that an individual who has been harmed might use them to obtain three kinds of remedies: equitable relief, declarative relief, and damages. The former two can be sought through the types of mandatory class actions regulated in sections (b)(1)(A) and (b)(2) of the FRCP 23. Instead, if the plaintiff wants to obtain damages she will have to file a (b)(3) *class action for damages* or a (b)(1)(B) *limited fund class action*.

It should be noted that plaintiffs can also request damages along with equitable or declarative relief. In order to allow the joinder of claims, however, almost every federal Circuit

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<sup>98</sup> Art. 5, sections II and IV.

<sup>99</sup> For a brief presentation of the argument and further references, see Gregório Assagra de Almeida “*Codificação do Direito Processual Coletivo Brasileiro*”, Del Rey Ed., Belo Horizonte, 2007, pp. 113-116, 156 (arguing at p. 115 that the control of the prerequisite is “one further tentative to Americanize the Brazilian collective system”).

<sup>100</sup> See Antonio Gidi “*Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil*”, UNAM, México, 2004, p. 79 (arguing that “there is a general fear about the power, inclination and professional capability of civil law judges to examine the adequacy of the representatives in a case by case basis. Even though it is difficult to accomplish such a task, the control of the adequacy of representation cannot be left completely outside the scope of judicial scrutiny”). In the same position, see Ada Pellegrini Grinover, “*Acciones colectivas iberoamericanas: nuevas cuestiones sobre la legitimación y la cosa juzgada*”, Relatorio presented at the Roma Convention (May, 2002), organized by the Iberoamerican Institute of Procedural Law and the “*Centro di Studi giuridici latinoamericani dell’Università Tor Vergata*” from Rome, on the topic of “*Azioni popolari e azioni per la tutela di interessi collettivi*”, point 2 (arguing that, notwithstanding the absence of any express provision regarding this theme, “the Brazilian system is not contrary to the control of the adequacy of representation by the court in a case by case basis”). Pellegrini Grinover has affirmed this position in several works published after that Relatorio. See for example the article in which she argues that adequacy of representation should be considered as a “collective procedural principle”, exclusive of this field of law (Ada Pellegrini Grinover “*Derecho Procesal Colectivo*”, RDP, 2006-2, pp. 387 ff).

Court in the US demands that the equitable relief must predominate over the monetary one. In other words, the monetary relief must be “incidental”.<sup>101</sup> This “predomination requirement” serves two basic purposes: on the one hand, it protects the legitimate interests of potential class members who might wish to pursue their monetary claims individually, and on the other, it preserves the legal system’s interest in judicial economy.<sup>102</sup>

## ii. Argentina

It analyzing this topic it is relevant to take into account that the separation between equity and law jurisdictions has never existed in Argentina and Brazil. That is why the concept of “remedy” is quite unfamiliar for our procedural law tradition, at least if we think about it strictly in the way US lawyers do.<sup>103</sup>

The last reform of the CPA brought about important changes in respect to the way in which the damages awarded as a result of the action can be distributed among class members.<sup>104</sup> However, the reform did not change the kind of remedies that representative parties can pursue in a consumers’ collective case (except for the introduction of a “civil fine” that resembles the US punitive damages).<sup>105</sup> In this respect there are no limits or special provisions in the CPA, and because of that the representative party may seek, as in the US system, declarative, injunctive and monetary relief.

The big difference between the US system and the Argentinean one in this respect is that the latter does not provide (in the CPA or by case law) for an assessment of any sort of “predomination requirement”. Hence, in principle it is possible to seek those remedies in the same lawsuit without further requirements than those established by art. 330 of the ACCP, which contains the principal rules on pleading in individual and ordinary civil proceedings (i.e. a

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<sup>101</sup> See *“Allison v. Citgo Petroleum Corp”*, 151 F.3d 402 (5th Cir., 1998).

<sup>102</sup> *Ibidem*.

<sup>103</sup> However, the SCJA did use this wording in *“Halabi”* (see parag. 12°, 16° and 19° of the majority opinion). For a discussion of the terminology problems surrounding the concept of “remedies” in a comparative analysis, see Paola Bergallo *“Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina”*, available at [http://www.law.yale.edu/documents/pdf/Justice\\_and\\_Experimentalism.pdf](http://www.law.yale.edu/documents/pdf/Justice_and_Experimentalism.pdf).

<sup>104</sup> According to art. 54, parag. 3 and 4 of the CPA, if the case has monetary content the judgment must establish the guidelines for the economic reparation or, when not possible, the proceedings that have to be follow in order to achieve that reparation. The provision also introduced a sort of fluid recovery mechanism by authorizing that, in restitution cases, the judge can order defendants to distribute the money through the same means that it was illegally charged in the first instance. When this is not possible, the court can use other systems that allow the members of the class *“to access to the reparation”*. Finally, in case the beneficiaries of the judgment cannot be individualized, the CPA vests the judge with great discretion by allowing her to implement a distribution mechanism *“in the way most beneficial for the affected group”*. When the lawsuit involves not an action for restitution but an action for damages, the CPA authorizes the judge to create sub-groups in order to determine the appropriate individual damages and to proceed to its distribution.

<sup>105</sup> See *infra* FN 168.

precise identification of the cause of action, the kind of remedy sought and the accurate description of the facts from which the cause of action arise).

### iii. Brazil

As we have seen, both the PACA and the CDC provisions are applicable in collective cases involving consumers' protection. The CDC applies mostly to those cases where the representative party seeks to obtain damages for the individual members of the group ("homogeneous individual" rights), while an action seeking injunctive relief and/or damages for the class as a whole ("diffuse" and "collective" rights) will be basically governed by the PACA (once again, remember that both regulations are strictly interrelated).<sup>106</sup> It should be stressed here that the collective action in protection of individual homogeneous rights *"is basically an issue class action"*. The judgment rendered therein will just declare defendant's liability, and the members of the group will need to file individual claims to show causation and the scope of damages in order to recover.<sup>107</sup>

The CDC contains a wide range of alternatives when it comes to shape the adequate remedy for a particular case. The general principle is that any kind of action *"capable of providing an adequate and effective redress"* will be admissible to protect consumers' collective, diffuse and individual rights.<sup>108</sup> In cases seeking to enforce *"an obligation to do or not to do"* (injunctive relief), the judge should grant the specific requested remedy.<sup>109</sup> The CDC authorizes to transform the obligation into damages only in case it is impossible to provide for that specific performance.<sup>110</sup> Courts are also allowed to grant provisional measures when the claim has serious basis and the interested party gives good reasons for thinking that the judgment on the merits could be deprived of its efficacy in the absence of that measure.<sup>111</sup> In order to compel the party to comply, Brazilian judges have the power to impose daily economic penalties both in the judgment on the merits and in the context of provisional measures.<sup>112</sup>

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<sup>106</sup> See Antonio Gidi *"Class Actions in Brazil. A Model for Civil Law Countries"*, 51 J. Comp. L. 311, 326-327 (2003).

<sup>107</sup> See Antonio Gidi *"Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil"*, UNAM, México, 2004, pp. 62-64 (arguing that this system poses serious limitations for obtaining adequate collective relief, particularly in the context of small claims class actions).

<sup>108</sup> Art. 83 CDC.

<sup>109</sup> Art. 84 CDC. Parag. 5 of this article specifies that in order to provide for specific redress *"or equivalent practical result"* courts can take all the necessary measures, including the use of the police force.

<sup>110</sup> Art. 84 parag. 1 CDC.

<sup>111</sup> Art. 84 parag. 3 CDC.

<sup>112</sup> Art. 84 parag. 3 CDC.

These directives are applicable in the context of the PACA too, which original 1985 text already provided that: (i) the action can be file in order to obtain a monetary judgment and to enforce an obligation to do or not to do as well;<sup>113</sup> and (ii) the judge can impose daily penalties and order provisional measures.<sup>114</sup> A particular feature of the PACA has to do with the destiny of the damages. Due to the fact that global damages obtained in this context will not be distributed among class members, the statute provides that the money must go to a special Fund administered by a Federal Council that will devote it to the solution of the problems caused by the defendant.<sup>115</sup>

**d. Which is the scope of finality obtained through the representative action?**

**i. United States**

One of the most salient characteristics of the FRCP 23 is the broad scope of finality it encompasses for the parties involved in the dispute. According to section (c)(3), the judgment issued in all type of class actions provided in section (b) will be binding on the members of the class, whether favorable or not to their interests. This binding effect is subject to a fundamental due process condition: an adequate representation exercised by the named plaintiff and her counsel.<sup>116</sup> In some cases, it is also necessary to provide for adequate notice and a right to opt-out in order not to affect the constitutional due process of law of absent members.<sup>117</sup> Even though the solution seems to be a simple one, this is far from being the truth. In fact, the scope of *res judicata* and its several implications has been one of the most discussed topics in this field.<sup>118</sup>

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<sup>113</sup> Art. 3 PACA.

<sup>114</sup> Arts. 11 and 12 PACA.

<sup>115</sup> Art. 13 PACA. A similar provision can be found in Argentina in the text of the General Environment Act N° 25.675 (art. 34). However, after almost 10 years since the Act was passed by Congress, this "Fund of Environmental Compensation" (*Fondo de Compensación Ambiental*) has not been implemented yet.

<sup>116</sup> See Samuel Issacharoff "Governance and Legitimacy in the Law of Class Actions", 1999 Sup. Ct. Rev. 337, 366 (1999) (arguing that "the key issue" for the legitimacy of this solution "is the guarantee that the agent be the faithful guardian of the interests of the class"). The leading case regarding adequacy of representation as a constitutional requirement is the very well known "*Hansberry v. Lee*" 311 U.S. 32 (1940).

<sup>117</sup> "*Phillips Petroleum*", 472 U.S. 797 (1985).

<sup>118</sup> See Antonio Gidi "*Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil*", UNAM, México, 2004, pp. 95-98 (arguing that most of the problems around the preclusive effects of a class action judgment are due not to difficulties in interpreting provision (c)(3), but to the very specific (and definitely much more complex) way in which the principle of finality operates in the US civil procedure). For a revision of the different doctrines on finality applied in the context US civil procedure, see Francisco Verbic "*La cosa juzgada en el proceso civil estadounidense y su influencia sobre el proyecto de reformas a la Ley N° 25.675*", RePro N° 167 (Enero) 2009, Revista dos Tribunais Ed, Sao Paulo.

## ii. Argentina

The reform introduced to the CPA by Act N° 26.361 gave the system the minimal coherence it had lost when the provision on *res judicata* included in the original text of the Act N° 24.240 was vetoed by the President.<sup>119</sup> In its current version, the CPA states that a favorable judgment to the plaintiff will produce *res judicata* effects in respect to the defendant and also to all consumers or users similarly situated, except those who manifest their will in order to avoid being bound by the solution.<sup>120</sup> It is considered as a *secundum eventum litis* mechanism,<sup>121</sup> and that right to opt-out should be exercised before the opinion is delivered, and according to the “*the terms and conditions imposed by the judge*”.<sup>122</sup>

It is apparent that the system of collective *res judicata* in Argentina is different from that enacted in the FRCP 23 context. In the CPA regime, the judgment can only benefit the members of the group and never preclude their individual rights in case of an opinion adverse to their interests. In light of this particularity, it is uneasy to explain why the legislator included a right to opt-out therein. It seems that it does not match with the kind of closure provided by the system. What incentive could have a member of the class to opt-out when an adverse judgment will not preclude his or her individual rights but only the collective claim? However, that right does make sense in the context of positive value claims if we bear in mind that collective adjudication tends to low the damages awarded to the members of the class.<sup>123</sup> In this way, the opportunity to opt-out allows the individual to take his chance in looking for her own judgment, without regard to what happens with the representative lawsuit.

The SCJA acknowledged in “*Halabi*” the necessity of overruling the traditional *inter partes* principle in this field. According to the court, this phenomenon finds justification in three arguments. The expansive effect of *res judicata* in this field: (i) is “*inherent to the very nature of the ‘acción colectiva’ in virtue of the relevance of the rights protected by its means*”; (ii) it “*recognizes its primary*

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<sup>119</sup> Presidential Decree N° 2089/93. The main reason invoked to sustain this veto was the governmental interest in avoiding the proliferation of cases. The Decree says that the eventual costs of those lawsuits would prejudice merchants and industries, and, through them, the consumers themselves by increasing the final costs of the products.

<sup>120</sup> Some justifications for this recognition are provided by Irigoyen, who was the Reporter of the Commission that worked on the new art. 42 AFC during the meetings that preceded the constitutional amendment of 1994. In a scholarly article published soon after the amendment was passed, he said that “*the scope of res judicata in amparo actions should be expansive because it is evident that the situation which trigger the application of that proceeding involves the interest of many people, and because it would be nonsense to recognize res judicata effects only in respect to the individual who filed the suit*” (see Roberto Irigoyen “*Fundamentos de la cláusula constitucional sobre defensa del consumidor*”, L.L. 1994-E-1020).

<sup>121</sup> See Ricardo Lorenzetti “*Justicia colectiva*”, Rubinzal Culzoni Ed., Santa Fe, 2010, pp. 282-283.

<sup>122</sup> Art. 54, 2nd parag. of the CPA.

<sup>123</sup> See Dennis E. Curtis and Judith Resnik “*Contingency Fees in Mass Torts: Access, Risk, And the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*” ), 47 DePaul L. Rev. 425, 446 (1998) (explaining the



source in the constitutional text”; and (iii) it is not a innovation but a “deeply-rooted institution in the current legal system”. I strongly agree with the first two arguments. But the wording is a little bit exaggerated in respect to the third one. Particularly if we take into account that on the one hand, this expansive scope was not enacted in the CPA until its 2008 reform; and on the other, the General Environment Act N° 25.675 –which contains a specific provision on this topic– was passed by Congress in 2002. kkk

As we have seen, “*Halabi*” also enumerated among the due process of law requirements that of providing adequate notice and a right to opt-out or to intervene if the absent members so desire. Even though the CPA contained the right to opt-out in its text thanks to the amendment of 2008, it has no provisions at all regarding notice. In this respect, it is fair to say that the holding on notice is dispositive for the correct operation of the system because of an obvious reason: if the members of the class are not aware of the proceedings, how are they supposed to exercise any kind of right? The other aspect of this issue that deserves a comment has to do with the opportunity of that notice and of the exercise of the right to opt-out or to intervene. The SCJA in “*Halabi*” did not say anything about that; however, it vested the judge with enough discretion to determine the proceedings whereby those activities should take place. The way US federal judges have implemented notice systems in the context of class actions for damages [FRCP 23(b)(3)] could play a decisive role of guidance in that respect.<sup>124</sup>

### iii. Brazil

The Brazilian system of collective *res judicata* provides for different scopes of closure depending on the kind of rights that are being discussed in the proceedings. First of all we have to mention art. 16 PACA, which establishes that the opinion will have “*erga omnes effects within the territorial limits of the court*” unless the claim is rejected due to lack of sufficient evidence on the merits (if that is the case, any other representative can initiate the same action as long as it can provide new evidence).<sup>125</sup> The main regulation in this respect, however, can be found in art. 103 CDC. This provision makes explicit the intertwined relationship between the type of collective rights and the proper scope of *res judicata* effects.

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commonplace assumption in some of the literature on aggregation in respect to the fact that “*in tort cases, group-based processing is a means to transfer money from plaintiffs with high value claims to plaintiffs with lower value claims*”).

<sup>124</sup> In a recent work I have explored the convenience of taking the US experience in case management under FRCP 23(d) as a source of ideas for Argentinean judges (see Francisco Verbic “*El rol del juez en las acciones de clase. Utilidad de la jurisprudencia federal estadounidense como fuente de ideas para los jueces argentinos*”, paper presented to the XXVI Argentinean Convention on Procedural Law, which will take place in Santa Fe city on July, 2011.

According to art. 103 CDC, the *res judicata* effects of opinions rendered in the context of collective actions will extend: (i) in respect to diffuse rights, *erga omnes* (in the same sense and with the same exception established by art. 16 PACA, even though the CDC does not mention any territorial limitation);<sup>126</sup> (ii) regarding collective rights, *ultra partes* but limited to the group, category or class of people being represented (here again, with an exception based on insufficient evidence on the merits);<sup>127</sup> and (iii) concerning individual homogeneous rights, *erga omnes* but only in case of a favorable opinion to the group and only for its benefit.<sup>128</sup>

The regulation on this topic expressly provides that the effect of *res judicata* in cases involving diffuse and collective rights never can prejudice the individual rights of the members of the affected group.<sup>129</sup> In cases involving individual homogeneous rights, in turn, those members of the group that did not intervene in the proceedings are able to bring individual suits if the opinion is adverse to their interests. Therefore, we can see that the consequences of both systems are the same: no individual right can be prejudice by any representative suit.<sup>130</sup>

From another perspective, we can see here another practical consequence that follows from the distinction between divisible and indivisible rights: for indivisible rights the systems makes available the exception based on lack of sufficient evidence, while the possibility of bringing another collective lawsuit on this ground is not present in the field of divisible rights.<sup>131</sup>

Finally, it is worth to underline the main characteristic that distinguishes all kinds of Brazilian *res judicata* from that implemented in the FRCP 23(c)(3): the judgment will have expansive effects only if it is favorable to the class, and in no case can prejudice the individual rights of the members of the group.

According to Gidi, this *secundum eventum litis* solution was correct in a context where the members of the class are not necessarily parties to the proceedings and may have no notice at

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<sup>125</sup> Art. 16 PACA, text after the reform introduced by Lei n° 9.494 de 10/09/97.

<sup>126</sup> Art. 103, ap. I CDC.

<sup>127</sup> Art. 103, ap. II of the CDC.

<sup>128</sup> Art. 103, ap. III of the CDC.

<sup>129</sup> Art. 103, § 1° of the CDC.

<sup>130</sup> Art. 103, § 2° of the CDC. See Ada Pellegrini Grinover, “The Defense of the Transindividual Interests: Brazil And Iberoamerica”, section 12, available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Brazil\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Brazil_National_Report.pdf) (explaining that this technique “was devised as an instrument against the possible collusion of the popular party against their counterpart (in order to get a contrary decision with *erga omnes* effects)”, and that it “has been reproduced from the law of the public civil action and from the consumer defense”).

<sup>131</sup> The scope of the exception is discussed in Ada Pellegrini Grinover, “Acciones colectivas iberoamericanas: nuevas cuestiones sobre la legitimación y la cosa juzgada”, Relatorio presented at the Roma Convention (May, 2002), organized by the Iberoamerican Institute of Procedural Law and the “Centro di Studi giuridici latinoamericani dell’Università Tor Vergata” from Rome, on the topic of “Azioni popolari e azioni per la tutela di interessi collettivi”, point 6.

all about the existence of the lawsuit.<sup>132</sup> He also explains that even though the notion of one-way preclusion can be useful to understand the system, it does not reflect its exact outcome because in Brazil an adverse opinion in a collective action does preclude the possibility of initiating the same collective action in the future (unless the “lack of evidence exception” applies to the case).<sup>133</sup> Therefore, the adverse opinion does not affect individual rights but in regard to the collective cause of action the rule on the topic is one of mutuality.

### III. SOME COMPARATIVE COMMENTS

The premises underlying the way in which the US, Argentina and Brazil face conflicts involving large numbers of people through representative suits are quite different, and the influence of tradition in order to explain that difference is apparent. As it is well known, in the civil law tradition the law is mainly interpreted (studied and applied) taking as a starting point abstract concepts and dogmatic definitions of legal principles. One such abstraction, which can be considered as the core idea of much of the civil law legal systems, is the notion of “subjective right”. Within this conception, in order to obtain a favorable opinion in a court of justice one needs to be the holder of a subjective right already recognized by some positive provision in the legal system. Hence, if there is no positive right to enforce, there is no available remedy to ask for.<sup>134</sup> Things are quite different within common law legal systems. There, as Thomas explains, judicial remedies perform two critical functions: *“they define abstract rights and enforce otherwise intangible rights. Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees”*.<sup>135</sup> This approach to the relationship between rights and remedies has made it possible to avoid anchoring the scope of judicial proceedings in a map of situations described beforehand as rights.<sup>136</sup>

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<sup>132</sup> See Antonio Gidi *“Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil”*, UNAM, México, 2004, pp. 102-103.

<sup>133</sup> See Antonio Gidi *“Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un Modelo para países de derecho civil”*, UNAM, México, 2004, pp. 100-101.

<sup>134</sup> The explanation is taken from Antonio Gidi *“Class Actions in Brazil. A Model for Civil Law Countries”*, 51 J. Comp. L. 311, 344 -349 (2003).

<sup>135</sup> See Tracy Thomas *“Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process”*, The University of Akron School of Law, Public Law & Legal Theory Working Papers Series N° 04-03, July 2004, p. 6, available at <http://ssrn.com/abstract=564302>.

<sup>136</sup> Luigi P. Comoglio, Corrado Ferri, Michele Taruffo *“Lezioni sul processo civile”*, 4<sup>th</sup> Ed., II Mulino Ed., Bologna, 2006, I, pp. 30-31. See also Hugo Mattei, Teemu Ruskola and Antonio Gidi *“Schlesinger’s Comparative Law”*, 7th Edition, Foundation Press, NY, 2009, pp. 636-637 (explaining the traditional picture this way: *“The common law lawyer is practical and pragmatic. He is the product of the practical needs of the bench at Westminster Hall. The civil lawyer is theoretical and abstract. He is the product of law professors in the Universities”*).

Being aware of that particular difference between the common law and civil law traditions is helpful when it comes to compare and understand the divergent approaches entailed in the US class actions, on the one hand, and in the systems currently established in Argentina and Brazil, on the other.

The strong influence of the civil law tradition in Brazil, for example, can be perceived in the first step taken in that country toward the implementation of aggregate litigation devices in the field of consumer protection. That first step was to enact collective subjective rights.<sup>137</sup> According to Gidi, the legal profession in Brazil assumed that if the legal system did not recognize such rights, any sort of collective proceeding would have had no reason to exist because it would have had nothing to protect.<sup>138</sup> In line with this explanation, it has been claimed recently that there must be a “*perfect and adequate mutual correspondence relationship*” between substance and procedure in this field of Brazilian law.<sup>139</sup>

Conversely, the weight of the common law tradition in the US has led to avoid introducing abstract categories of substantive collective rights and to provide collective redress any time that the conflict can be subsumed in some of the pragmatic situations described in section (b) of the FRCP 23. In other words, the availability of an aggregate litigation device is determined not by the nature of the right in dispute but, instead, by certain factual characteristics of the case to be solved by the judiciary.

Beyond the different traditions that have informed the inception of these systems and determined the way in which they deal with the phenomenon of complex litigation, it is possible to identify at least three relevant common core characteristics that cut across the board. These similarities are especially relevant because, as Nagareda explains, the “*structural dynamics, not so much the marked differences in the particulars of aggregate litigation procedure, represents the real story of convergence today*”.<sup>140</sup> Let us briefly mention them.

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<sup>137</sup> See Michele Taruffo “Some Remarks on Group Litigation in Comparative Perspective”, 11 Duke J. Comp. & Int'l L. 405, 415 (2001) (arguing about civil law countries that “An important source of the resistance to change, specifically to the class action model, is the force of inertia exerted by a group of traditional concepts customarily used to define the size of the archetypal litigation from a subjective and objective point of view”)

<sup>138</sup> See Antonio Gidi “Class Actions in Brazil. A Model for Civil Law Countries”, 51 Am. J. Comp. L. 311, 360-362 (2003). Gidi also argues there that in the early years of the CDC those definitions of rights “facilitated judicial application of the novel procedural rules and helped to establish the concept and scope of class action litigation. It was important then, even if only for pedagogical purposes, that the written law established and consolidated the theoretical contours of various group rights”. In a recent work I have criticized this way of approaching aggregate litigation in Argentina, arguing for a more pragmatic approach that should avoid the analysis of the phenomenon from a perspective of *essences* and *natures* of rights (see Francisco Verbic “Los procesos colectivos. Necesidad de su regulación”, L.L. 2010-A, 769).

<sup>139</sup> See Gregório Assagra de Almeida “Codificação do Direito Processual Coletivo Brasileiro”, Del Rey Ed., Belo Horizonte, 2007, p. 56.

<sup>140</sup> Richard A. Nagareda “Aggregate Litigation Across The Atlantic and the Future of American Exceptionalism”, 62 Vand. L. Rev. 1, 8 (2009). According to Nagareda, the structural dynamics of aggregate litigation arise from the relationship among three issues: (i) the nature of the contested activity that is the subject of the litigation; (ii) the scope of preclusive effect of the

In the first place, Argentina, Brazil and the US do not only tolerate but expressly recognize representative lawsuits as the main aggregate litigation mechanism available to deal with conflicts involving large groups of people.<sup>141</sup> This common feature tacitly implies a redefinition of the individual due process right to have “a day in court” when it comes to face collective conflicts. As it is well known, these kind of mechanisms transform that day in court into a right to be “represented” in the proceedings by counsel and individuals (or group organizations and public organisms) that the members of the group did not necessarily choose for that role, and that may act even against the will of some of them.

Secondly, the three systems show deep concerns for the protection of the rights of absent members of the class and regulate the representative proceedings accordingly. In the case of the US and Argentina, the due process of law of absent members is protected by controlling the adequacy of representation, sending satisfactory notice, and recognizing a right to opt-out and to intervene if the member of the class so desires. In the Brazilian system the protection is to a great extent softer because there is no rule providing for a case by case control of the class representative by the judge. The system takes for granted that the way it is designed is enough to protect individuals’ right to due process of law. That objective is thought to be accomplished by the denial of individuals’ collective standing to sue, the *ope legis* control over the organizations that can bring a representative suit, the strong role of the Public Ministry within the proceedings, and the regulation of *res judicata* in a way that never can prejudice individual rights of absent members.

Finally, all the three systems recognize the expansive scope of *res judicata* in this context. Brazil has a complex regime of different sorts of *res judicata* depending on the type of rights that is being enforced. This particular feature of the system can be understood as the corollary of the softer protection regarding due process of absent members during the proceedings. It might be said in this respect that Brazil has the best reinsurance for protecting those rights, i.e. not to bind individuals at all, except for the cases where they chose to be bound in order to profit from the judgment. On the contrary, the effects of judgments issued in the context of the FRCP 23 are dispositive for individual members of the class, whether or not favorable to

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judgment; and (iii) the territorial authority of the government that has constituted the court where the proceedings take place.

<sup>141</sup> See Fabrizio Cafaggi and Hans-W. Micklitz “Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community”, EUI Working Papers, LAW 2007/22, pp. 25-26, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1024103&http://search.foxtab.com/?s=1&chnl=irn&q=cafaggi%20micklitz%20consumatori&cd=2XzutCtN2Y1L1QzutC0CyE0B0DyC0Azy0Ezz0E0AtN0C0Czu0U0StN0D0TzutBtDtCtCtDtAtBzz&cr=2024437772](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024103&http://search.foxtab.com/?s=1&chnl=irn&q=cafaggi%20micklitz%20consumatori&cd=2XzutCtN2Y1L1QzutC0CyE0B0DyC0Azy0Ezz0E0AtN0C0Czu0U0StN0D0TzutBtDtCtCtDtAtBzz&cr=2024437772) (explaining the scope of “representative actions” and “group actions” in the field of consumers

their interests. That solution finds constitutional legitimacy in the already mentioned strong control of adequacy of representation and, in some cases, also in adequate notice and right to opt-out or to intervene depending on the circumstances.<sup>142</sup> The case of Argentina is particularly unusual. Although it seems obvious that judgments in representative suits should expand their effects over people other than the named plaintiff (otherwise they could not be considered representatives suits at all), this was far from clear until "*Halabi*" and its recognition of the "*constitutional roots*" of collective *res judicata*.<sup>143</sup> Since then, it seems that the Argentinean system presents a kind of hybrid approach to the issue: on the one hand, it has embraced the same procedural devices as those included in the FRCP 23 (what could be considered enough to sustain on constitutional grounds a *pro et contra* system of *res judicata* like the American one); while on the other, it has enacted in the CPA a *res judicata* that cannot prejudice the individual rights of absent members (similar, to some extent, to the Brazilian solution).

Summing up before going ahead, I would say that these systems share the way of facing aggregate litigation (representative suits), the constitutional concerns entailed in these kind of proceedings (due process of law of absent members of the class, mainly), and the way of dealing with those concerns in order to avoid harming individuals for the sake of judicial economy (through an adequate regulation of the proceedings, which in turn is dispositive on the issue of how to administer the scope of *res judicata*). As we will see in the next Part of this paper, those common features are particularly relevant when it comes to assess the viability of enforcing in Argentina and Brazil American judgments rendered in the context of consumer class actions proceedings.

#### **IV. RECOGNITION AND ENFORCEMENT OF AMERICAN CONSUMER CLASS ACTION JUDGMENTS IN ARGENTINA AND BRAZIL**

##### **a. The hypothetical**

Up to this point I have analyzed the main features of the representative procedural devices available in the US, Argentina and Brazil, showing that the US class actions are far from being something "exotic" in the current international context, and more particularly in the

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protection, and considering the American class actions as a group action which has "*very specific features that do not exist in European group actions model*").

<sup>142</sup> "*Phillips Petroleum Co. v. Shutts*", 472 U.S. 797 (1985).

<sup>143</sup> Parag. 21° of the majority opinion.

American continent. The aim of this last part of the paper is to assess the consequences of the abovementioned similarities among systems when it comes to enforce a judgment rendered in the US in the context of a FRCP 23 consumer class action. Specifically, I will assess the three most relevant arguments that could be raised in Argentina and Brazil in order to avoid enforcement: (i) public policy considerations (“public order”); (ii) due process of law concerns; and (iii) proper assertion of jurisdiction in the country where the judgment was delivered. In order to face the problem I will bring into play a hypothetical.

Let us think that there is a company with its principal place of business located in Buenos Aires, Argentina. It is incorporated under the laws of New York, its shares are negotiated in the Stock Market of New York and, though sporadically, it also does business in New York. The company’s main business is to sell laptops, very cheap laptops. Six years ago the company sold 4000 defective laptops in Buenos Aires, 1000 in Brazil, and 1000 in New York. All of them had the same problem: when you were listening to music from the internet, they overheated and restarted by themselves after a couple of hours. An Argentinean buyer moved to New York 2 months after the transaction, and –with counsel from a very well known law firm from New York- he obtained a favorable (b)(3) class action judgment against the company and on behalf of himself and the other 5.999 buyers of defective laptops. The New York Court of Appeals affirmed the opinion and the Supreme Court denied the certiorari requested by the company. As a result, the plaintiff has a judgment condemning the company to repay the value of the laptop, compensatory and punitive damages plus interests. The company has all its assets in Buenos Aires City and Sao Paulo.

## **b. Recognition and enforcement. General rules**

### **i. Exequatur in Argentina**

As I have mentioned, one of the powers not delegated to the federal government in Argentina is the one to enact codes of procedure. That is why there is a Federal Code of Civil Procedure which applies in federal courts and the City of Buenos Aires (hereinafter “ACCP”), along with 23 local codes. While the original version of the ACCP was adopted without modifications by most of the provinces, it has acquired unique profiles in the last three decades due to different subsequent reforms.<sup>144</sup> Moreover, several Provinces have also reformed their

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<sup>144</sup> Especially the major reforms introduced by Acts N° 22.434 and N° 25.488.

systems, enacting new codes of procedure that differ a lot from the ACCP. Notwithstanding all that, the principles governing *exequatur* are considered as part of Argentinean international law and its core implications are quite similar in every province.<sup>145</sup> Hence, though I will focus in the ACCP we should keep in mind that the local codes contain no substantial differences in this respect.

Art. 517 of the ACCP regulates the *exequatur*, imposing the conditions that a foreign judgment must fulfill in order to be recognized and/or enforced in Argentina. As a court of appeals has described it, the *exequatur* is “a jurisdictional order by which, under Argentinean law, the court authorizes the foreign judgment to produce its effects in national territory”.<sup>146</sup> That judicial order “goes to the judgment itself and confers to it the same status as domestic judgments”.<sup>147</sup> The proceeding (which also receives the name of *exequatur*) does not encompass the analysis of the substantial relation debated in the foreign court where the judgment was rendered, even when that judgment applies Argentinean law.<sup>148</sup> Instead, it has been characterized as a “procedural exam” necessary to verify the judgment’s capacity to be enforced in Argentina.<sup>149</sup> Without regard to the scope of the analysis, before deciding on the issue the court has to provide an opportunity for the other party to discuss “whether the requirements are fulfilled in the case”.<sup>150</sup>

Prior to presenting the conditions imposed by the ACCP, it is important to note that this code only applies when there is no international treaty binding the country where the judgment was rendered and Argentina.<sup>151</sup> The most relevant treaty ratified by Argentina in this field is the Inter American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.<sup>152</sup> It has also signed bilateral agreements with Brazil, Italy and France.<sup>153</sup> There is no treaty binding Argentina and the US in this area of law. In fact, the US is not a

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<sup>145</sup> The only relevant issue to take into account in this respect has to do with the requisite of reciprocity. While the ACCP does not demand it anymore, some provinces still do.

<sup>146</sup> “G.B., S. M.”, Cámara Nacional de Apelaciones en lo Civil, opinion issued 06/10/2010, AR/JUR/40218/2010 (citt, omitted). In the same line, “M.A.A.E. y Y.S.G. c/ M.C.B.A.”, Cámara Nacional de Apelaciones en lo Civil, Sala G, opinión issued 03/21/89.

<sup>147</sup> *Ibidem*.

<sup>148</sup> See “Cameron, Claudia Elizabeth s/ Exequatur”, Cámara Nacional de Apelaciones en lo Civil, Sala E, opinion issued 07/03/01.

<sup>149</sup> “Meier Astrid, Adelaida E. y otro”, Cámara Nacional de Apelaciones en lo Civil, sala G, opinion issued 03/21//89, LL 1989-E, 475.

<sup>150</sup> “Grado Francesco c/ Sunzeri de Di Prospero”, Cámara de Apelaciones en lo Civil y Comercial de Morón, sala II, opinion issued 09/10/02.

<sup>151</sup> This is true even in the context of all local codes (see Juan Carlos Hitters “Efectos de las sentencias y de los laudos arbitrales extranjeros”, L.L. 1996-A, 954).

<sup>152</sup> OEA, CIDIP. II, Montevideo 1979. Argentina is also a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”, ONU, New York 1958), but it is not relevant for the purposes of this paper.

<sup>153</sup> See Juan Carlos Hitters “Efectos de las sentencias y de los laudos arbitrales extranjeros”, L.L. 1996-A, 954. For an enumeration of the different treaties ratified by Argentina in this field, see Enrique Falcón “Comentario al Código Procesal Civil y Comercial de la Nación y Leyes Complementarias”, II, Abeledo-Perrot Ed., Buenos Aires, 1998, pp.839-840.



party to any international agreement on the topic of enforcement of foreign judgments.<sup>154</sup> Therefore, in determining whether our consumer can enforce the class action judgment in Argentina we are governed by art. 517 ACCP. Let us briefly revise which are the requirements imposed by that provision.

First of all, the judgment has to be rendered by a competent tribunal and must have acquired *res judicata* effects in the country of origin.<sup>155</sup> Secondly, the defendant need to receive adequate service of process and the proceedings which led to the judgment must have been conducted showing respect of her due process of law.<sup>156</sup> In the third place, the ACCP requires that the judgment must not affect the Argentinean public order.<sup>157</sup> Finally, it must not be incompatible with other prior or concomitant judgment issued by an Argentinean court.<sup>158</sup> Among all these requirements, the truly “essential” and most complex aspects for deciding about the *exequatur* petition can be summarized as follows: “a) authenticity; b) due process; c) international public order. The first issue is aimed to determinate whether the judgment is authentic (...) the second to verify, through documentary evidence, whether a judicial organ has intervened and the proceedings were according to due process of law principles (...) Finally, the judgment must not infringe the public order.”<sup>159</sup>

## ii. Homologation in Brazil

The proceeding by which a foreign judgment is recognized for enforcement in Brazil is called “homologation”. The 1934 Federal Constitution vested the Supreme Federal Court of Brazil with original and exclusive jurisdiction to homologate foreign judgments. That jurisdiction was included in the 1988 Federal Constitution too, but art. 105.i. (as amended in 2004) has reallocated this power in the Superior Court of Justice (hereinafter “BFC” and “SCJ”).<sup>160</sup> This represents a significant difference with the Argentinean system, where the *exequatur* proceedings can be initiated before the ordinary courts of first instance. In assessing

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<sup>154</sup> Jacques de Lisle and Elizabeth Trujillo “Consumer Protection in Transnational Contexts”, 58 Am. J. Comp. L. 135, 142-143 (2010). Enforcement of foreign judgments in the US is governed by state law. The majority of the states have adopted, with variations, the Uniform Foreign Money Judgments Recognition Act (UFMJRA).

<sup>155</sup> Art. 517 inc 1° ACCP.

<sup>156</sup> Art. 517 inc 2° ACCP.

<sup>157</sup> Art. 517 inc 4° ACCP.

<sup>158</sup> Art. 517 inc 5° ACCP. Art. 517 inc. 3° also requires certain formal requirements that should be taken into account, even though they do not merit further analysis for the purposes of this paper.

<sup>159</sup> “Meier Astrid, Adelaida E. y otro”, Cámara Nacional de Apelaciones en lo Civil, sala G, opinion issued 03/21//89, L.L. 1989-E, 475.

<sup>160</sup> Art 102.h. of the Federal Constitution of 1988 included among the original jurisdiction of the Supremo Tribunal Federal “a homologação das sentenças estrangeiras e a concessão do exequatur às cartas rogatórias, que podem ser conferidas pelo regimento interno a seu Presidente”. This power was transferred to the STJ through the Constitutional amendment N° 45 of 2004. The current text

the Brazilian mechanism, Jardim de Santa Cruz Oliveira considers that it entails relevant advantages in terms of predictability and consistency in the rulings. However, she also argues that the SCJ is facing an overwhelming caseload, and that its jurisdiction “*should be restricted to relevant federal issues*”.<sup>161</sup>

The homologation proceeding is governed by the abovementioned constitutional provision, art. 15 of the Law of Introduction to Brazilian Legal System,<sup>162</sup> and Resolution N° 9/2005 (adopted by the SCJ soon after the 2004 amendment to the BFC).<sup>163</sup> As the *exequatur* in Argentina, this proceeding transforms the foreign judgment into a domestic title, allowing the interested party to proceed towards its enforcement (which takes place in a completely different

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provides in its Art. 105.i. that the STJ has jurisdiction in respect to “*a homologação de sentenças estrangeiras e a concessão de exequatur às cartas rogatórias*”.

<sup>161</sup> Maria Angela Jardim de Santa Cruz Oliveira “*Recognition and Enforcement of United States Money Judgments in Brazil*”, 19 N.Y. Int’l L. Rev. 1, 6-8 (2006).

<sup>162</sup> “*Lei de Introdução às normas do Direito Brasileiro*” (originally named as “*Law of Introduction to the Brazilian Civil Code*”, “*Lei de Introdução ao Código Civil Brasileiro*”), available at <http://www.planalto.gov.br/ccivil/Decreto-Lei/Del4657.htm>. Art. 15 says: “*Art. 15. Será executada no Brasil a sentença proferida no estrangeiro, que reuna os seguintes requisitos:*

- a) haver sido proferida por juiz competente;*
- b) terem sido os partes citadas ou haver-se legalmente verificado a revelia;*
- c) ter passado em julgado e estar revestida das formalidades necessárias para a execução o lugar em que ,foi proferida;*
- d) estar traduzida por intérprete autorizado;*
- e) ter sido homologada pelo Supremo Tribunal Federal”*

<sup>163</sup> Available at <http://bdjur.stj.gov.br/dspace/handle/2011/368>. The Code of Civil Procedure (Lei 5.869 de 11 de Janeiro de 1973) contains only one article on this topic: art. 483, which states that the opinion of a foreign court will only have efficacy in Brazil after being homologated by the SCJ, and that this homologation proceeding will be regulated by the SCJ. However, it must be noted that a project to enact a new code of civil procedure has been recently passed by the Brazilian Senate (on December 15<sup>th</sup>, 2010) and is awaiting for treatment in the other House. This project, in which Prof. Teresa Arruda Alvim acted as General Reporter, introduce some reforms in the area of enforcement of foreign judgments that should be taken into account (though they do not seem to modify the basic premises of the current system, because they mainly incorporate the requisites now established in the Resolution N° 9/2005). The text of the Project is available at <http://asadip.files.wordpress.com/2010/09/anteprojeto1.pdf>. Regarding the field of enforcement of foreign judgments, the project contains the following provisions:

“*Art. 878. A homologação de decisões estrangeiras será requerida por carta rogatória ou por ação de homologação de decisão estrangeira.*

*Parágrafo único. A homologação obedecerá ao que dispuser o Regimento Interno do Superior Tribunal de Justiça.*

*Art. 879. As decisões estrangeiras somente terão eficácia no Brasil após homologadas.*

*§ 1º São passíveis de homologação todas as decisões, interlocutórias ou finais, bem como as não judiciais que, pela lei brasileira, teriam natureza jurisdicional.*

*§ 2º As decisões estrangeiras poderão ser homologadas parcialmente.*

*§ 3º A autoridade judiciária brasileira poderá deferir pedidos de urgência, assim como realizar atos de execução provisória, nos procedimentos de homologação de decisões estrangeiras.*

*§ 4º Haverá homologação de decisões estrangeiras, para fins de execução fiscal, quando prevista em tratado ou em promessa de reciprocidade apresentada à autoridade brasileira.*

*Art. 880. São passíveis de homologação as decisões estrangeiras concessivas de medidas de urgência, interlocutórias e finais.*

*§ 1º O juízo sobre a urgência da medida compete exclusivamente à autoridade jurisdicional requerente.*

*§ 2º A decisão que denegar a homologação da sentença estrangeira revogará a tutela de urgência.*

*Art. 881. Constituem requisitos indispensáveis à homologação da decisão:*

- I – ser proferida por autoridade competente;*
- II – ser precedida de citação regular, ainda que verificada a revelia;*
- III – ser eficaz no país em que foi proferida;*
- IV – estar autenticada pelo cônsul brasileiro e acompanhada de tradução oficial;*
- V – não haver manifesta ofensa à ordem pública.*

*Parágrafo único. As medidas de urgência, ainda que proferidas sem a audiência do réu, poderão ser homologadas, desde que garantido o contraditório em momento posterior.*

*Art. 882. Não serão homologadas as decisões estrangeiras nas hipóteses de competência exclusiva da autoridade judiciária brasileira.*

and independent proceeding).<sup>164</sup> Another similarity between both regimes is in the scope of judicial inquiry: Brazilian judges, like their Argentinean peers, cannot revise the merits of the case but only its external and formal requisites.<sup>165</sup> Finally, there are little differences with Argentina regarding the characteristics that a foreign judgment must present in order to be homologated by the SCJ. In that respect, art. 5 of the Resolution N° 9/2005 contains a list of four “*indispensable requirements*”, i.e.: (i) the foreign opinion must have been issued by an authority with jurisdiction to adjudicate the controversy;<sup>166</sup> (ii) the parties must have received adequate service of process;<sup>167</sup> (iii) the judgment has to be final with force of *res judicata*;<sup>168</sup> and (iv) it needs to be authenticated by the Brazilian Consul, and accompanied with an official translation.<sup>169</sup> The list is complemented by art. 6, which provides that a foreign judgment will not be homologated in Brazil if it offends “*the sovereignty or the public order*”.<sup>170</sup> Hence, the only relevant differences with the Argentinean regime in this respect are: (i) the Brazilian system does not make explicit any concern about due process of law; and (ii) it has no provision prohibiting homologation when there is a domestic incompatible opinion regarding the same cause of action. However, it is worth to note that Brazilian courts have held that due process of law concerns are entailed in the broader idea of public order.<sup>171</sup>

One last remark before going ahead: Brazilian collective procedural law does not provide for special rules about enforcement of judgments (except for some limited regulation about who have standing to claim that enforcement, and which is the destiny of the damages awarded in the opinion when they have to be applied to repair a global harm). That is why the

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Art. 883. A decisão extraída dos autos da homologação será efetivada em conformidade com as regras que regem a execução de sentença estrangeira.”

<sup>164</sup> Art. 484 of the Code of Civil Procedure states that, once the homologation by the SCJ has been issued, enforcement has to be sought through the same proceedings that apply for enforcement of domestic judgments. According to art. 4 of the Resolution 9/2005, absent homologation the foreign judgment will not have “efficacy” in Brazilian territory (same wording of art. 483 of the Code of Civil Procedure). See Maria Angela Jardim de Santa Cruz Oliveira “*Recognition and Enforcement of United States Money Judgments in Brazil*”, 19 N.Y. Int’l L. Rev. 1, 2 (2006). See also Nadia de Araujo “*Dispute Resolution in MERCOSUL: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court*”, 32 U. Miami Inter-Am L. Rev. 25, 46 (2001) (explaining that “If entered by a court in a MERCOSUL country, the judgment will go directly to the Brazilian Supreme Court for exequatur of the rogatory letter itself. If entered by a court in a non-MERCOSUL country, the prevailing party must seek homologation of the judgment from the President of the Supreme Court”).

<sup>165</sup> This, in turn, is reflected in the defenses available to the party opposing the homologation petition. Art. 9 of the Resolution 9/2005 provides as follows: “*Na homologação de sentença estrangeira e na carta rogatória, a defesa somente poderá versar sobre autenticidade dos documentos, inteligência da decisão e observância dos requisitos desta Resolução*” (“in the process of homologation of a foreign judgment and rogatory letters, defenses can only be grounded on authenticity of the documents, scope of the opinion and the requirements established by this Resolution”).

<sup>166</sup> Resolution 9/2005, art. 5, parag. I.

<sup>167</sup> Resolution 9/2005, art. 5, parag. II.

<sup>168</sup> Resolution 9/2005, art. 5, parag. III (“*ter transitado em julgado*”).

<sup>169</sup> Resolution 9/2005, art. 5, parag. IV. Art. 3, in turn, provides that the petition for homologation must be accompanied with a certificate or authentic copy of the whole opinion and any other “*indispensable documents*”, all of them with their pertinent translations.

<sup>170</sup> Resolution 9/2005, art. 6 (“*soberania ou a ordem pública*”).

<sup>171</sup> See *infra*, section “c”.

enforcement of foreign collective judicial opinions is governed in Brazil by the same rules that those applicable to the enforcement of foreign ordinary individual judgments.<sup>172</sup> Exactly the same happens in Argentina.

**c. Recognition and enforcement. An analysis of the most relevant available defenses**

Leaving aside the formal requirement concerning the authenticity of the document and its translation, the next sections of the work will assess the scope of the three defenses that might be deemed to be the most relevant in this field: (i) public policy (“public order”); (ii) due process of law; and (iii) jurisdiction in the country where the judgment was rendered. A brief digression about a related topic seems appropriate here as well. It has to do with the “final judgment” requirement. In that respect, both Argentina and Brazil require that the opinion has to have acquired *res judicata* effects in order to be enforceable, which means that no ordinary appeal should be available for the opposing party.

**i. Public policy defense (“public order”)**

The idea of public order is mostly employed in a negative sense, as a ground to justify a refusal to apply certain law even when the conflict of law provisions of the forum points in that direction. It is a principle of private international law *“which exists in all legal systems, even in the absence of specific precedents”*.<sup>173</sup>

The scope of this notion in Argentina is mainly framed by two provisions. On the one hand, art. 19 of the AFC rules that the order and the public morality are the limits of private actions; on the other, art. 21 of the Civil Code reflects this notion in the field of contracts, ruling that, when entering into agreements, people cannot set aside certain legal provisions related with the public order and *“good customs”*. The principle is that Argentinean judges are not going to enforce a foreign judgment if that enforcement would amount to a strong violation of an Argentinean law and the rights thereby protected.<sup>174</sup> In light of the SCJA opinion in *“Halabi”* and all the similarities between the way of providing for representatives

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<sup>172</sup> See Carolina Gallotti *“Fase Inicial do Cumprimento de Sentença – Lei N. 11.232, de 22.12.2005”*, in Patricia Borba Marchetto *“Direito Processual Civil”*, Juarez de Oliveira Ed., Sao Paulo, 2009, pp. 76.

<sup>173</sup> Osvaldo Marzorati *“Los límites del acuerdo arbitral”*, L.L. 2010-B, 946.

<sup>174</sup> Enrique Falcón *“Comentario al Código Procesal Civil y Comercial de la Nación y Leyes Complementarias”*, II, Abeledo-Perrot Ed., Buenos Aires, 1998, p. 842.

suits in Argentina and the US in the field of consumers' rights, from a public order perspective there should be no problem to recognize and enforce the judgment obtained by our consumer in New York against a private corporation. What is more, since the 2008 reform to the CPA it might be said that even a punitive damages award can be enforced in Argentina because art. 52 bis of the CPA now expressly allows judges to impose "civil fines" in consumer protection cases. However, the Act provides for a limit of 5 million pesos in this respect (approximately 1.25 million dollars). Hence, it is doubtful whether an Argentinean court would to enforce a punitive damages award that goes beyond that amount.<sup>175</sup>

Brazilian doctrine and precedents on this notion of public order are not so different. They distinguish three levels. The first one is a fundamentally internal or domestic public order, represented by those legal rules and principles that cannot be set aside by agreement between individuals. The second level is that of international law, entailed in those provisions that allow the authorities to deny effect to foreign acts and judgments when they contravene internal principles. This is the level in which the public order defense against a homologation claim should be analyzed. Finally, the third level describes a set of global principles applicable to international relations.<sup>176</sup>

The public order of second level comprehends both substantive and procedural principles and rules. Even though both art. 15 of the Law of Introduction to Brazilian Legal System and the Resolution N° 9/2005 contain express provisions regarding some aspects of due process of law (jurisdiction in the court that rendered the opinion and proper service of process), those requirements do not exhaust the scope of a possible defense based in a violation of that fundamental constitutional guarantee. Any violation of due process that goes beyond lack of jurisdiction and proper service of process can be raised in Brazil by pleading on grounds of public order. One of the most relevant precedents in this respect, at least in the context of our hypothetical, is the one in which the Federal Superior Court declared that the use of juries in American civil trials does not offend Brazilian public order.<sup>177</sup>

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<sup>175</sup> For a brief overview of the new provision and some criticisms about it, see María I. Rua *"El daño punitivo en la reforma de la ley de Defensa del Consumidor"*, L.L. 2009-D, 1253. For a precedent considering excessive costs and attorneys' fees imposed abroad as a violation of the public order even when they can be considered as legitimate in the country where the judgment was rendered, see *"Ogden Entertainment Services Inc. c. Eijo, Néstor E. y otro"*, Cámara Nacional de Apelaciones en lo Comercial Sala E, opinion issued 09/20/2004, L.L. 2005-B, 21.

<sup>176</sup> See Carmen Tiburcio *"A ordem pública na homologação de sentenças estrangeiras"*, in Luiz Fux, Nelson Nery Jr. and Teresa Arruda Alvim Wambier *"Processo em Constituição"*, Revista dos Tribunais Ed., Sao Paulo, 2006, pp. 209-213.

<sup>177</sup> STF, SEC 4415/EU, Tribunal Pleno, 11.12.96.

Here again, as in the case of Argentina, the existing similarities between the mechanisms to adjudicate collective consumer disputes strongly point toward the rejection of the public order defense in the context of our hypothetical.

## ii. Due process of law defense

Another reason why courts in Argentina and Brazil could refuse recognition or homologation of foreign judgments is related to due process concerns. In Argentina, the requirement is made explicit by art. 517 ACCP, while in Brazil it has been considered as entailed in the broader concept of public order.<sup>178</sup> Which are the consequences of the similarities between the aggregate procedural regimes of the three countries when it comes to assess this particular issue?

Let us first analyze the situation in Argentina. If we compare the requirements enacted in the CPA and enunciated by "*Halabi*" with those imposed by the FRCP 23 and the US Supreme Court in "*Phillips Petroleum v. Shutts*", it is clear that they are quite similar.<sup>179</sup> In fact, the Argentinean system can be deemed to be even more stringent than the US one because "*Halabi*" asks for more than adequacy of representation, notice and right to opt-out or intervene (as "*Shutts*" and its progeny do).<sup>180</sup> Therefore, an Argentinean court sitting in an *exequatur* proceeding and confronting a FRCP 23 consumer class action opinion might not have serious problems to discard any objection based on due process of law considerations.

Let us now turn to Brazil. Even though the due process of law defense is not expressly enacted in its legislation (which only contemplates proper service of process and the jurisdictional question), as I have already explained in the previous section "*it is certainly encompassed within the principle of public policy*".<sup>181</sup> The right to due process of law is recognized in art. 5º, LIV of the BFC and encompasses some basic corollaries like the right to display an adequate defense, to contradict the arguments and the evidence of the opposing party, and to

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<sup>178</sup> Even though in Argentina this defense is explicitly enumerated in art. 517 of the ACCP, some courts have held, in the same line that their Brazilian peers, that the principle of due process of law "*integrates the national public order*". See "*Ogden Entertainment Services Inc. c. Eijo, Néstor E. y otro*", Cámara Nacional de Apelaciones en lo Comercial Sala E, 20/09/2004, L.L. 2005-B, 21.

<sup>179</sup> But see Debra L. Bassett "*Implied 'Consent' to Personal Jurisdiction in Transnational Class Litigation*", 2004 Mich. St. L. Rev. 619 (arguing that "*the presence of non-U.S. claimants in class litigation requires additional due process protections. In particular, this article concludes that traditional notions of consent to personal jurisdiction do not survive scrutiny in the transnational class action context, thereby requiring an affirmative opt-in procedure in order to bind non-U.S. claimants to a U.S. class judgment*").

<sup>180</sup> See supra section II.a.ii.

<sup>181</sup> Maria Angela Jardim de Santa Cruz Oliveira "*Recognition and Enforcement of United States Money Judgments in Brazil*", 19 N.Y. Int'l L. Rev. 1, FN 189 (2006).

obtain motivated decisions.<sup>182</sup> Within this context, in light of the main features of Brazilian collective procedural system there might be no difficulties to enforce in Sao Paulo the judgment obtained by our consumer. The situation would be different in an alternative scenario. In case of an adverse opinion to the group in the class action proceedings, a corporation seeking to enforce a judgment against an individual would probably be impeded to do that. In this case, it is likely that the *pro et contra* system of *res judicata* established in the US would not pass the Brazilian due process threshold. As we have discussed, collective judgments rendered in Brazil can only benefit absent members of the class but never prejudice their individual rights.

### iii. Jurisdictional defense

Even when it can be considered as part of the due process inquiry, both in Argentina and Brazil the lack of proper jurisdiction in the original lawsuit is expressly contemplated as a defense against enforcement. Interestingly, this is also a point of convergence with the US, where the lack of jurisdiction is an available defense to avoid the almost automatic enforcement of judgments rendered in sister states in light of the Full Faith and Credit Clause (art. IV of the US Federal Constitution).<sup>183</sup>

In Argentina and Brazil the topic is assessed in light of the international concurrent jurisdiction principle.<sup>184</sup> That means that the foreign judgment must have been entered by a court having jurisdiction to adjudicate under the rules on international conflict of laws of those countries. The only exception to that principle in Brazil can be found in art. 89 of the BCCP, which vests the Brazilian judiciary with exclusive jurisdiction over cases dealing with real estate located in that country and in certain issues related to successions. In the case of Argentina, its Civil Code contains the same exception in respect to real estate,<sup>185</sup> and also a provision making mandatory Argentinean jurisdiction to adjudicate when a decedent has left only one heir and he

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<sup>182</sup> See Carmen Tiburcio “A ordem pública na homologação de sentenças estrangeiras”, in Luiz Fux, Nelson Nery Jr. and Teresa Arruda Alvim Wambier “Processo em Constituição”, Revista dos Tribunais Ed., Sao Paulo, 2006, p. 221.

<sup>183</sup> “Art. IV: Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof”. See “*Fauntleroy v. Lum*”, 210 US 230, 236 (1908), citing Marshall’s classic doctrine on the topic and considering it “correct” in a case where the cause of action in the first lawsuit (where the opinion was rendered) was illegal under the laws of the state where enforcement of that judgments was sought: “The doctrine laid down by Chief Justice Marshall was ‘that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States’”).

<sup>184</sup> See Enrique Falcón “Comentario al Código Procesal Civil y Comercial de la Nación y Leyes Complementarias”, 11, Abeledo-Perrot Ed., Buenos Aires, 1998, p. 840; Maria Angela Jardim de Santa Cruz Oliveira “Recognition and Enforcement of United States Money Judgments in Brazil”, 19 N.Y. Int’l L. Rev. 1, 12 (2006).

<sup>185</sup> Art. 10 of the Civil Code. For an English version of the Code, see Julio Romanach Jr. “Civil Code of Argentina”, Lawrence Publishing Co., Baton Rouge, 2001.

or she is domiciled in that territory.<sup>186</sup>

In Brazil, art. 88 of BCCP contains specific provisions on international jurisdiction to adjudicate. According to that article, Brazilian courts are competent in three scenarios: (i) when the defendant is domiciled in that territory, without regard to its nationality;<sup>187</sup> (ii) when the obligation has to be performed there;<sup>188</sup> and (iii) when the cause of action arises from a fact that took place in that territory.<sup>189</sup> It also contains a special paragraph by which foreign corporations are deemed to be domiciled in Brazil if they have an affiliate or subsidiary company established therein. In Argentina there is no such a provision on international jurisdiction. However, the SCJA has held that the proper solution is to recognize *“a concurrent plurality of forums in order to assure the parties’ right of access to justice”*. The Court also held that absent a more specific and conventional solution *“any place of performance of contractual obligations in Argentina justifies the opening to the international jurisdiction of Argentinean judges”*.<sup>190</sup>

Both countries embrace a broad conception in respect to this requirement. Moreover, there might be no problem to enforce the decision of our consumer if we take into account that proper jurisdiction of the New York federal court (based on the test set forth in *“International Shoe”* and its progeny)<sup>191</sup> will be acceptable in Argentina and Brazil because it is also the place where the company is incorporated and doing business (situation that would confer jurisdiction over the case to Argentinean and Brazilian courts as well).

## **V. FINAL REMARKS: COMMON OBJECTIVES AND COORDINATION OF PARALLEL LITIGATION IN MASS SOCIETIES**

I have discussed in this paper the principal features of the most relevant aggregate litigation mechanisms available in the US, Argentina and Brazil to face collective conflicts involving groups of consumers and users. I have also explained that these mechanisms share certain common core characteristics, notwithstanding the different legal traditions informing the context where they are implemented. Finally, I have argued that those similarities converge to a great extent in order to make more likely than not the enforcement in Argentina and Brazil

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<sup>186</sup> Art. 3285 of the Civil Code. There are other provisions regarding divorce actions but they are not relevant for the purposes of this paper.

<sup>187</sup> Art. 88, parag. I of the BCCP.

<sup>188</sup> Art. 88, parag. II of the BCCP.

<sup>189</sup> Art. 88, parag. III of the BCCP.

<sup>190</sup> See *“Cri Holding Inc. c. Compañía Argentina de Comodoro Rivadavia S.A. s/ exhorto”*, SCJA, opinion issued 11/03/09, *Fallos* 332:2435; and *“Holiday Inns Inc. c. Ebasa Exportadora Buenos Aires S.A.”*, SCJA, opinion issued 04/05/05, *Fallos* 328:742.

<sup>191</sup> *“International Shoe Co. v. Washington”*, 326 U.S. 310 (1945).



of consumer class action judgments rendered against private corporations in a federal US court under FRCP 23. At the time of the conclusions I would like to add just a couple of final comments.

The first one is related to one further common core characteristic among those legal systems. It is represented by the public policy objectives underlying the implementation of these kinds of aggregate litigation devices. To a greater or less extent, all of them are aimed to: (i) provide a means to obtain enough closure for all the parties involved in the dispute; (ii) produce huge savings in the justice administration system resources; (iii) make available a particularly efficient mechanism to access to the (alarmingly expensive) justice system;<sup>192</sup> and (iv) deter illicit conducts through the collective enforcement of private rights. Despite the differences in culture and legal tradition that may be identified between the US, Argentina and Brazil, those public policy concerns cut across the board and go well beyond them. The main cause of the underlying problem in the field of consumers and users (and likely in other collective procedural settings as well), can be found in the way businesses are conducted nowadays. As Taruffo explains, the increased transnational character of commerce has dramatically changed the characteristics of the conflicts to be solved by the judiciary.<sup>193</sup> The globalization of the economy, the massive production of goods and services and the consequent appearance of multinational enterprises doing business all along the globe have set forth a complicated worldwide scenario where thousands of people are affected in similar ways without regard to national borders. Facing this phenomenon, all those three countries have already decided that there are several grounds to justify the use of aggregate litigation devices in contemporary constitutional democracies. Even more specifically, they have decided as well that the advantages of representative suits outweigh their negative aspects.

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<sup>192</sup> In respect to the US situation, see the Report of the Legal Services Corporation *"Documenting the Justice Gap in America"*, available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf) (showing that, according to state-level studies, less than one in five of the legal problems experienced by low-income people are addressed with help from a lawyer). It should be mentioned here that the programs financed by the LSC cannot bring class actions suits due to an express prohibition established by Congress (see Helaine M. Barnett *"Justice for All: Are we Fulfilling the Pledge?"*, 41 Idaho L. Rev. 403; Jessica A. Roth *"It is Lawyers We are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation"*, 33 Harv CR-CL L Rev 107, 156 (1998)). Regarding Argentina, see the empirical research conducted by Roberto O. Berizzone *"Evaluación provisional de una investigación empírica trascendente para el mejoramiento del servicio de justicia"*, E.D. 114-860 (finding that the costs of a judicial proceeding amount to approximately 61% of the economic content of the dispute); more generally see María S. Sagués *"Falcencias del Acceso a la Justicia en la Tutela del Consumidor en Argentina: Problemáticas y Perspectivas"*, available at <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/32/pr/pr6.pdf> (discussing the barriers on access to justice and suggesting some possible ways to face the problem).

<sup>193</sup> See Michele Taruffo *"Some Remarks on Group Litigation in Comparative Perspective"*, 11 Duke J. Comp. & Int'l L. 405, 420-421 (2001) (highlighting that *"In a globalizing world, a growing number of legal relationships and situations cannot be interpreted any longer solely within the frameworks of nation-states or national legal systems. Many legal issues and transactions that used to be typically nationwide in the past, or even much smaller in scale, now frequently turn into transnational and sometimes worldwide legal problems"*).

From a comparative perspective, we can see in what I have just said another point of convergence between civil law and common law traditions in this field of civil procedure. The most striking phenomenon is that the abovementioned globalized economic background has forced a shifting from individual to aggregate adjudication in a way that civil law professors, lawyers and judges probably would have never imagined a century ago.

It may be said that this kind of representative proceedings is just going through a developing and experimental phase in Argentina. And that may be true. However, both the text of the AFC after the amendment of 1994 and the opinion of the SCJA in "*Halabi*" have provided strong constitutional foundations to the system. That opinion, in fact, has accelerated the process of consolidation in this area of the law in a way that makes the enactment of adequate procedural regulations in the near future almost inexorable. In regard to Brazil, instead, we find more than 20 years of practice with aggregate litigation mechanisms. Characterized by strong constitutional roots as well, Brazilian collective civil procedure has evolved so rapidly and consistently that nowadays there is a strong movement toward its codification.

Both the Argentinean and Brazilian rules, in turn, have been undoubtedly and manifestly influenced by the US federal class actions. Even though the FRCP 23 does not find its roots in the text of the US Constitution, several precedents of the Supreme Court have subjected the constitutional legitimacy of the mechanism to strong due process of law considerations.<sup>194</sup> Hence, as I have argued in Part III, the convergence among systems is also apparent in that: (i) the main concern of the collective procedural mechanisms is how to protect the rights of absent members of the class; and (ii) though in different technical ways, they deal with that concern first and foremost in terms of due process of law. In other words, all the three countries consider their collective procedural systems as rooted in the Constitution, and all of them have agreed to sacrifice a portion of individual autonomy for public gain.

A final comment I want to make here has to do with the problems that might arise in situations involving multiple transnational collective suits filed in different countries in order to obtain a ruling on the same cause of action. The hypothetical I presented at the beginning of Part IV assumes that the case of our consumer was brought in the US, and that it was brought only by one representative party. However, it is evident that the fact pattern of the conflict would allow the existence of parallel and overlapping litigation, not only within the US but also

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<sup>194</sup> See "*Hansberry v. Lee*", 311 US 32 (1940); "*Phillips Petroleum Co. v. Shutts*", 472 US 797 (1985); and "*Amchem Products, Inc. v. Windsor*", 521 US 591 (1997).

in Argentina and Brazil.<sup>195</sup> Once again, the main cause of this situation can be traced to the current commercial practices already described.

The problem is not alien for the US class action system, particularly due to the absence of *lis pendens* rules in that context and to the political federal structure of the country (what can provoke an overlap between two federal class actions, two state class actions, and also between a federal and a state class actions). As Miller has explained when discussing the law governing the phenomenon of multi-forum litigation by the middle of 1990, the solution of the problem requires a compromise between two values: efficient enforcement of the law and respect for the principles of multiple sovereignty.<sup>196</sup> I am well aware that the tension between these values is even stronger in an international cross-border litigation scenario, and so it would be to achieve plausible compromises in order to handle the coordination issues that might arise therein. However, in the current context of globalized commerce and internet sales it seems inevitable that the time has come to start discussing about possible mechanisms to coordinate aggregate transnational litigation. On the one hand, such a mechanism would be useful to avoid the manifest concerns of forum shopping and incompatibility of procedural law between different legal systems;<sup>197</sup> and on the other, it will also provide for a more comprehensive closure of mass disputes at the less possible cost.<sup>198</sup>

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<sup>195</sup> It is likely that both an Argentinean and a Brazilian court would assert jurisdiction over the company if a collective action were filed in those countries.

<sup>196</sup> Geoffrey P. Miller "Overlapping Class Actions", 71 N.Y.U. L. Rev. 514, 516-517 (1996) (arguing that "the move toward an exclusive forum model for large-scale cases is necessary and desirable. The inherently interstate nature of many large-scale class actions makes the parallel litigation model impractical, or at least exceedingly expensive and inconvenient, as compared with the exclusive forum approach. The important practical question is the form which the development will take", and proposing an "auction approach" to answer that question).

<sup>197</sup> For a recent example of the problems entailed in class actions involving a group of people from different countries see "*In re Vivendi Universal, S.A. Securities Litigation*". The class in the case is described as follows: "If you are from the United States, France, England, or the Netherlands and bought or otherwise acquired ordinary shares or American Depositary Shares (ADSs and/or ADRs) of Vivendi Universal S.A. between October 30, 2000 and August 14, 2002 you are a Class Member in this action" (see <http://www.vivendiclassaction.com>).

<sup>198</sup> Here again, I think that the US experience with problems of parallel litigation can provide interesting guidelines. Some of the instruments currently employed to deal with coordination of interstate class actions are: (i) Class Actions Fairness Act, 28 USC 1711 et. seq. (2005); (ii) Removal, 28 USC 1441(a); (iii) Multidistrict litigation, 28 USC 1407(a); (iv) Full Faith and Credit Clause, art. IV, Section 1 of the US Constitution; (v) Full Faith and Credit Act, 28 USC 1738; and (vi) Anti-Injunction Act, 28 USC 2283.